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Commission ("ICC") insofar as they (a) declared that Alleghany was to be considered a carrier and subject to specified provisions of the Interstate Commerce Act, relating principally to accounts, reports, and issuance of securities, pursuant to § 5(3) of the Interstate Commerce Act, and (b) authorized Alleghany to issue a new class of 6% convertible preferred stock in exchange for its outstanding 5½% preferred stock. The court also enjoined Alleghany, its transfer agents, officers, directors, servants and employees from taking any steps in connection with or in furtherance of the issuance or transfer of such 6% convertible preferred stock.

The opinion on final decree (R. 651-673) of the District Court, rendered November 18, 1955, is reported at 138 F. Supp. 123. Two supplemental opinions rendered December 23, 1955 and January 27, 1956 are not reported (R. 674-675, 680) nor is a further supplemental opinion, filed December 7, 1956 while this appeal was pending. Memorandum opinions of January 27, 1956 denying the motion of Alleghany for a new trial (R. 560-565) and denying the motion of intervenor-defendants, Baker, Weeks & Co., et al. for reargument are reported at 138 F. Supp. 138 (R. 675-678, 679-680).

The majority and minority opinions of the District Court on interlocutory injunction are reported at 134 F. Supp. 132 (R. 601-639). Opinions of an evenly divided court denying supersedeas pending appeal are not reported (R. 639, 642). Mr. Justice Harlan's opinion, granting partial supersedeas on appeal, is reported at 75 Sup. Ct. 912 (1955) (R. 643-650).

The Reports of Division 4 of the ICC and of the full Commission respectively dated March 2 and May 24, 1955, in Finance Dockets 14692 and 18656 ("status dockets"), relating to ICC's jurisdiction over Alleghany and approving acquisitions of control of carriers, are reported at 290 I. C. C. 725 and 295 I. C. C. 11 (R. 414-446, 506-515).

The Report and Order of Division 4 in Finance Docket No. 18866 ("preferred stock docket") dated May 26, 1955 approving a voluntary exchange of Alleghany securities, and the order of the full Commission dated June 22, 1955, denying reconsideration are not reported (R. 518-537, 554). The Report of Division 4 in Finance Docket 18789 ("Boston & Albany proceeding") dated March 4, 1955, approving additional acquisitions of control of carriers is not reported (R. 450-471).

Jurisdiction

The final decree of the District Court was entered December 23, 1955 (R. 555-557); motions for a new trial and reargument were denied January 27, 1956 (R. 675-678, 679-680); Alleghany filed its notice of appeal on January 31, 1956 (R. 3-22). The jurisdiction of this Court is invoked under Title 28, U. S. C. §§ 1253 and 2101(b). This Court noted probable jurisdiction on April 23, 1956 (R. 681).

Statutes Involved

The pertinent provisions of the statutes involved are set forth in the Appendix at the end of this brief. These statutes are: the Interstate Commerce Act, 24 Stat. 379 (1887), as amended, 49 U. S. C. §§ 1 et seq.; the Investment Company Act of 1940, 54 Stat. 789 (1940), as amended, 15 U. S. C. § 80a; the Securities Act of 1933, 48 Stat. 74 (1933), as amended, 15 U. S. C. §§ 77a et seq.; and the United States Judicial Code, Title 28, U. S. C. §§ 1336, 2321-2325.

Questions Presented

1. Whether orders issued in 1955 by ICC which (a) ordered that Alleghany be considered as a carrier subject to regulation under the Interstate Commerce Act and (b) authorized Alleghany to issue new 6% convertible preferred stock in exchange for its outstanding 5½% preferred stock

are reviewable at the suit of minority stockholders under the Urgent Deficiencies Act (Title 28, U. S. C. §§ 1336, 2321-2325).

2. Whether a 1945 ICC order, which directed that Alleghany be considered as a carrier subject to regulation under the Interstate Commerce Act, and which contained a provision that it should continue in effect unless and until otherwise ordered by ICC, automatically ceased to be in effect by reason of factual changes in Alleghany's control of carriers or did in fact continue in effect in accordance with its terms; and whether such order retained efficacy despite its termination by ICC in a subsequent ICC order issued in 1955, which ordered that Alleghany continue so to be considered as a carrier but which was set aside by the court below.

3. Whether a 1945 SEC order which (a) determined that Alleghany had ceased to be an investment company within the meaning of the Investment Company Act of 1940 and (b) terminated Alleghany's registration under such Act, but which provided that if Alleghany should cease to be subject to regulation under the Interstate Commerce Act the order might be revoked after notice and hearing, lost its efficacy as to (a); but not as to (b), without any action by SEC revoking the order.

4. Whether ICC, in approving in 1955 a merger of two rail carriers controlled by The New York Central Railroad Company ("Central") and through it by Alleghany, and approving a lease of the merged companies' properties to Central, had jurisdiction under § 5(3) of the Interstate Commerce Act to order that Alleghany should be considered as a carrier subject to regulation under the Interstate Commerce Act.

5. Whether Alleghany at the time ICC approved such merger and lease, and at the time ICC approved the new issue of 6% convertible preferred stock, was subject to regulation under the Interstate Commerce Act, and therefore exempt from the Investment Company Act under § 3(c)(9).

6. Whether the 1955 ICC orders here under review were properly set aside by the District Court on the ground that in the proceedings leading to such orders there were procedural defects relating to the type of hearing accorded appellees, the form of certain of the findings and the sufficiency of the evidence to support such findings.

7. Whether the District Court, convened as a statutory three-judge Court to review challenged orders of ICC, erred in expanding its judgment to include an injunction against completion by Alleghany of an exchange of new 6% convertible preferred stock for outstanding 5½% preferred stock.

STATEMENT OF THE CASE

Preliminary Comment

At the outset certain extraordinary aspects of the decision below should be noted. That decision has far-reaching implications in disrupting orderly administrative procedure as well as extremely serious consequences for thousands of individual stockholders of Alleghany.

The District Court reached the conclusion that Alleghany, which controls one of the largest railroad systems in the country, New York Central, and which has been continuously regulated by ICC as a carrier ever since 1945, was not subject to ICC regulation and instead was an in-

vestment company subject to SEC regulation under the Investment Company Act of 1940; and that—through no fault of its own—it lost its registration under that Act. On the basis of that conclusion the District Court, in the judgment here appealed from, set aside orders issued by ICC in 1955 exercising regulatory jurisdiction over Alleghany.

The court reached this result in the face of long standing orders, dating from 1945, by which both ICC and SEC declared Alleghany subject to the Interstate Commerce Act and therefore not an "investment company" as defined in the Investment Company Act. By their express terms, the orders of both ICC and SEC were terminable only by their further order (R. 183-186). Both agencies have for years interpreted their orders as continuing to subject Alleghany to ICC regulation.

Orderly administrative procedure requires that orders of commissions, such as those of ICC and SEC in this case, be given effect pursuant to their terms until revoked or modified by further order. It is obvious that any legal system which contemplated that the regulated company should shuttle back and forth automatically from one agency to another, depending solely upon the factual situation at any given moment, and wholly ungoverned by orders of the regulating agencies, would have chaotic consequences. The regulated company would never know with any certainty which agency was in control. The company's decision in the matter might turn out to be in complete disagreement with that of the regulating agency.

Patently, it is neither fair to the regulated company to place upon it the burden, nor administratively sound to confer upon it the privilege, of deciding for itself which agency has jurisdiction and when administrative orders are to be considered as automatically revoked by changes in the factual situation, without regard to provisions contained in the orders declaring them revocable only by further order.

If the administrative process is to function in a reasonable and orderly way, the regulating agency which issues an order must be the body which determines whether the factual situation has sufficiently changed to require its revocation or modification.

The court's action in setting aside the 1955 ICC orders, although based on reasoning which we submit is entirely erroneous, was at least within its jurisdiction under the Urgent Deficiencies Act if the orders were reviewable at the instance of the appellees. But the court then proceeded on to action beyond any power committed to it by law. It in effect set aside the 1945 order of SEC. It declared Alleghany subject to the Investment Company Act and purportedly enforced that Act at the suit of private individuals. It enjoined Alleghany, its officers and transfer agents, from further action in connection with an exchange of 1,300,000 shares of new convertible preferred stock for an outstanding preferred, which exchange was designed to eliminate $18,000,000 of accumulated preferred arrears and permit dividends on the common for the first time in twenty-five years. It prohibited any transfers of 900,000 shares of the new stock already in the hands of stockholders (R. 56, 106-107, 647-648, 556-557).

The preferred stock exchange offer had been approved as fair and in the public interest by ICC (R. 518-537, 554). It had been approved by vote of large majorities of all classes of Alleghany stock, including over 97 per cent of the common stock voting upon it (over 70 per cent of the entire class) (R. 79, 648). Nonetheless, the District Court blocked the issue. This was not because the court found any legal or factual infirmity in the exchange plan. It was solely because on the court's statutory interpretation (diametrically opposed to the administrative interpretation) ICC was without jurisdiction to issue its 1955 order continuing Alleghany in carrier status, and Alleghany there-

fore automatically became an unregistered investment company.

The results of such action by the court are disastrous for both Alleghany and its stockholders. In view of such Investment Company Act provisions as those of § 7 and § 47(b), the effect of the decision below might be to invalidate retroactively many contracts or transactions in which Alleghany has participated over the past several years. The serious consequences of this reach not only Alleghany but those who have dealt with it during that period. There are dire results also for Alleghany stockholders. Large numbers of Alleghany's preferred stockholders have received new preferred stock now made unmarketable, except in hand-to-hand transactions, by a court order rendering it neither transferable, salable nor bankable. Numerous others have surrendered their old stock but are prevented by the court's order from receiving certificates for the new. All of them are left with a frozen asset, deprived of their capital and their dividends, and denied the use of their money to meet obligations or expenses or even to pay estate taxes upon the stock itself.

Mr. Justice Harlan stayed the injunction (pending appeal) as to transfer of the 900,000 shares of new preferred stock already in the hands of stockholders, stating that he would be disposed to extend the stay to the remaining 400,000 shares but for the fact that it might render the appeal to the full Supreme Court moot (R. 643-650). Unfortunately, this stay proved of little practical help to the stockholders since the New York Stock Exchange and the National Association of Securities Dealers, Inc. continued to suspend trading in the stock because of the cloud hanging over the issue (R. 174-175).

The extreme relief granted by the court below went far beyond its jurisdiction and would have been an abuse of discretion even if within its jurisdiction.

The Facts

A. Regulation of Alleghany Prior to September 1954

Immediately after passage of the Investment Company Act of 1940, Alleghany registered with the SEC as an investment company (R. 193). It continued under SEC jurisdiction until 1945 when ICC by order issued June 5, 1945 asserted regulatory jurisdiction over Alleghany, and SEC by order of October 4, 1945 recognized that jurisdiction over Alleghany had passed to ICC (R. 183-185, 185-186). This transference of jurisdiction came about through the interplay of § 5 of the Interstate Commerce Act and § 3(c)(9) of the Investment Company Act (both set forth in the Appendix). This jurisdiction of ICC, in our view, has continued at all times since. The theory of the court below that it somehow lapsed, at some vaguely defined time, cannot be supported on this record.

Section 5 of the Interstate Commerce Act prohibits, among other things, except upon ICC approval given under § 5(2), the acquisition by a non-carrier of control of two or more carriers, or the acquisition by a non-carrier, already controlling one carrier, of control of one or more additional carriers. Section 5(3) provides that ICC may subject any non-carrier making such an acquisition to regulation under §§ 20(1) to (10) and §§ 20a(2) to (11) of the Interstate Commerce Act (i.e., sections relating mainly to keeping of accounts, making of reports, access to records, issuance of securities and assumption of liabilities). In recognition of this provision of law, and to avoid dual agency jurisdiction, § 3(c)(9) of the Investment Company Act exempts from SEC regulation under that Act "any company subject to regulation under the Interstate Commerce Act".

In September 1944, Alleghany, then in control of The Chesapeake and Ohio Railway Company ("C. & O."), filed

with ICC, in line with the then recently enunciated doctrine of *United States v. Marshall Transport Co.*, 322 U. S. 31 (1944), an application supplemental to one filed by C. & O. for authority under § 5(2) to acquire the properties of Norfolk Terminal & Transportation Company, a carrier by rail, all of whose capital stock was owned by C. & O. and whose properties were under long-term lease to C. & O. Alleghany's supplemental application requested approval of the "acquisition of the properties of the Norfolk Terminal and Transportation Company by The Chesapeake and Ohio Railway Company, and control thereof by Alleghany Corporation through its control of The Chesapeake and Ohio Railway Company."

On June 5, 1945, ICC issued its report and order (R. 183-185) approving these transactions and ordering, pursuant to § 5(3), that Alleghany, a non-carrier, "unless and until otherwise ordered by the Commission" was to be considered a "carrier" subject to regulation under the Interstate Commerce Act. *Chesapeake & Ohio Railway Company Purchase*, 261 I. C. C. 239 (1945) ("*C. & O. Purchase* case"). ICC retained a continuing jurisdiction over the proceeding.

Following the entry of this order SEC held hearings and on October 4, 1945 issued an opinion which, after reviewing Alleghany's status, the ICC proceedings, and the scope of ICC's regulatory authority over Alleghany, concluded that "Alleghany is subject to regulation under the Interstate Commerce Act", and that "it follows" that Alleghany is "excepted" from the Investment Company Act by § 3(c)(9) thereof. *Matter of Alleghany Corporation*, 20 S. E. C. 731, 735-736 (1945). The accompanying SEC order declared that "Alleghany Corporation has ceased to be and is not now an investment company within the meaning of the Investment Company Act of 1940", and that "if in the future Alleghany ceases to be subject to regulation under the Interstate Commerce Act" the

SEC's order "may be revoked, suspended or modified after appropriate notice and opportunity for hearing" (R. 185-186). This order is still outstanding, unrevoked, unsuspended and unmodified.

In the years that followed Alleghany gradually disposed of its C. & O. stock, and on January 19, 1954 it completed such disposition and simultaneously announced its intention to conduct a proxy contest for control of Central (R. 399-614). In the light of its obligations under the 1945 ICC order and in view of ICC's retained jurisdiction, Alleghany then formally notified ICC that it had divested itself of control of C. & O. and therefore regarded itself as free to acquire control of another rail carrier (R. 274-275). Alleghany's notification to ICC made no claim that the 1945 ICC order was a nullity or that Alleghany was no longer subject to ICC jurisdiction.

At that time and throughout the Spring of 1954 while Alleghany engaged in its ultimately successful proxy battle for control of Central, there were immense advantages to be gained by Alleghany's renouncing, avoiding, or withdrawing itself from, ICC regulatory jurisdiction. Recognizing the disadvantages to Alleghany of ICC jurisdiction, the old Central management resorted to legal maneuvers before ICC, ultimately unsuccessful, to block Alleghany's acquiring control of Central, all of which were premised on the assumption that Alleghany continued subject to ICC regulation (R. 420-422).*

*The 1945 ICC order conditioned its approval of Alleghany's continued control of C. & O. upon both Alleghany's and C. & O.'s trusteeing all stocks held by them of carriers not within the C. & O. system (R. 419). A petition to ICC by the old Central management requested an investigation whether Alleghany was violating this aspect of the ICC 1945 order by holding carrier stocks (i.e., of Central) which should have been trusteed. Another petition to ICC by the old Central management sought a ruling that Alleghany could not seek control of Central in a proxy fight without prior ICC approval (R. 421).

Meanwhile Alleghany continued to conduct itself as subject to ICC regulatory jurisdiction since it recognized that (1) the 1945 order by its terms continued until further order of ICC, (2) § 15(2) of the Interstate Commerce Act mandatorily requires that an ICC order shall continue in effect until further ICC order (unless made for a specified period of time), and (3) Alleghany could not, by its own act or for its own advantage, terminate an ICC order and withdraw itself from ICC regulation. Moreover, ICC in acknowledging on February 5, 1954 Alleghany's notification of the C. & O. divestiture, had referred to its June 5, 1945 order and stated that "attention is invited to the following provision in the Commission's order:

> *'It is further ordered,* That unless and until otherwise ordered by this Commission, said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act. . . .'" (R. 187-188)

At Central's annual meeting on May 25, 1954, Alleghany prevailed in its proxy fight and elected to Central's board a slate of directors selected by Alleghany (R. 513, 217).

Promptly upon announcement of Alleghany's victory, ICC, in the belief that its 1945 order taking jurisdiction over Alleghany required re-examination in the light of Alleghany's divestiture of C. & O. and successful Central campaign, called upon Alleghany to show cause why the 1945 ICC order should not be terminated (R. 423).

Alleghany responded by stating that it had no objection to termination of so much of the 1945 order as concerned C. & O., but pointed out that there was in preparation an application, involving merger of two Central subsidiaries and lease of their properties, which would necessarily raise the question of Alleghany's continued carrier status under

the Interstate Commerce Act and would presumably result in ICC's continuing to subject Alleghany to its regulation (R. 423). It was therefore requested that action on the show cause order be delayed pending the preparation and filing of such application. ICC, by order of July 23, 1954, postponed for sixty days action on its show cause order to allow Alleghany time to file the new application (R. 423). This application, dated September 17, 1954, culminated in the two status orders set aside by the court below.* In these status orders ICC ordered that Alleghany should continue to be considered a "carrier" subject to regulation under the Interstate Commerce Act.

Meanwhile, SEC took cognizance of ICC's June, 1954 show cause order regarding the 1945 ICC order. By order of July 7, 1954 SEC reopened its own 1945 Alleghany proceeding to determine whether SEC should revoke, modify or suspend its own 1945 order which had terminated Alleghany's registration under the Investment Company Act (R. 193, 185-186). Alleghany petitioned for postponement of the SEC hearing, representing itself as willing to submit to regulation by either SEC or ICC, but as reluctant to undertake an SEC hearing while Alleghany's status was *sub judice* before ICC. SEC by a series of orders postponed its scheduled hearing from time to time and finally to an indefinite date, subject to call by the examiner. SEC's several postponing orders embodied a stipulation that, if ICC relinquished jurisdiction over Alleghany, the SEC hearing might be earlier convened, and also that Alleghany would not, without SEC approval, undertake in the interim any act prohibited by the Investment Company Act. (Unprinted Record 2344-2345).

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*The term "status orders" herein refers to the order of ICC's Division 4 issued on March 2, 1955, and the order of the full Commission affirming it which was issued on May 24, 1955.

not to be extended lightly. Alleged injuries so speculative, intangible and remote, and common to all stockholders, if to any, do not furnish a proper occasion for resort to a three-judge court.

A. Appellees Lacked Standing to Seek Review of the Status Order.

1. LACK OF STANDING TO CHALLENGE THE STATUS ORDER AS SUCH. As stated above, the District Court in its second opinion conceded that the appellees may not have suffered any injury as a result of the status order, and asserted that the status order standing alone may not have been reviewable. In retreating to this position, the court was perhaps influenced by Judge Hincks' persuasive dissent from the court's initial decision that standing to challenge the status order could be supported by the asserted interest of the appellees in the "benefits" and "protection" afforded by the Investment Company Act. As Judge Hincks pointed out (R. 630), that interest was one shared by all of Alleghany's investors, since the Investment Company Act was designed to protect all classes of investors, not merely common stockholders. Accordingly, said Judge Hincks, that was an interest which could not support standing to seek review of an ICC order in the light of this Court's holding in *Pittsburgh & West Va. Ry.* v. *United States.*, 281 U. S. 479, 487 (1930) that a minority stockholder has no standing under the Urgent Deficiencies Act to challenge an ICC order affecting his corporation where his interest in the order is one shared by all other investors in the corporation. As Judge Hincks stated (R. 630):

> "If plaintiffs' standing to sue is predicated upon a threatened loss of the protection afforded by the Investment Company Act, it is difficult for me to reconcile my brothers' holding on this point with *Pittsburgh & W. Va. Ry.* v. *U. S.*, 281 U. S. 479,

B. The 1954 Merger and Lease Application and the 1955 Status Orders

On September 17, 1954, Central, Alleghany, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company ("Big Four") and Louisville & Jeffersonville Bridge and Railroad Company ("Bridge Company") jointly applied for an ICC order under § 5 of the Interstate Commerce Act (1) approving the merger of Bridge Company into Big Four, (2) approving revision of Central's lease of Big Four properties so as to include Bridge Company's properties within the lease, (3) authorizing control by Big Four, Central, and Alleghany of the properties and franchises of Bridge Company as so merged and leased, and (4) continuing Alleghany in carrier status (R. 210-235).

The application showed (R. 215-218): that Central, Big Four and Bridge Company were carriers by railroad subject to the Interstate Commerce Act; that Alleghany, by virtue of the 1945 ICC order, was considered as a "carrier" subject to regulation under the Interstate Commerce Act; that Central controlled Big Four through ownership of 98.98% and 86.45%, respectively, of its common and preferred stock; that the properties of Big Four were operated by Central under a 99-year lease made in 1930; that Big Four owned all the capital stock of Bridge Company, which stock was held by Central under the terms of the 1930 lease; that Alleghany controlled Central as the result of a proxy contest in which the slate of directors nominated by Alleghany had been elected to Central's board; that Alleghany had an undivided one-half interest in 600,000 shares of Central stock, with full voting rights to such 600,000 shares; that Alleghany owned outright an additional 15,500 shares of Central stock;* that the Chairman of the Board of Directors of Alleghany was also Chair-

*These stock holdings were increased before the issuance of ICC's first status order.

> 487. For I find nothing in that Act which suggests that it was intended, or is effective, as a protection *peculiar to common stockholders*. Nor have plaintiffs shown that *as common stockholders* they have peculiar need of protection under that Act not available to all classes of Alleghany security holders under that Act. The *Pittsburgh* plaintiffs were held to be without standing because their 'financial interest does not differ from that of every investor' in the Company. Even if it were so that the interest of these plaintiffs to protection under the Investment Company Act is as efficacious for purposes of standing to sue as a 'financial interest,' nevertheless it would seem to me to be an interest which 'does not differ from that of every investor' in Alleghany securities." (Italics Judge Hincks').

In no case that we have found has a dissident stockholder been permitted to challenge an ICC order issued under § 5 of the Interstate Commerce Act, except where the order threatened the stockholder with a direct and immediate harm which would be independently suffered by him or a defined group of stockholders of which he was a member. The sharp limitations on a minority stockholder's standing to challenge ICC orders are illustrated by the decision of Judge Mack on behalf of a 3-judge court in *New York Central Securities Corp.* v. *United States*, 54 F. 2d 122 (S. D. N. Y. 1931), aff'd, 287 U. S. 12 (1932). In that case, a minority stockholder of three carriers, New York Central, Big Four and Michigan Central, sought to challenge under § 5 an ICC order which, among other things, approved a lease to New York Central of the properties of its partly-owned subsidiaries, Big Four and Michigan Central. The leasing arrangements provided that *the minority stockholders* of the lessor corporations (Big Four and Michigan Central) were to be paid "dividend rentals" by New York Central as lessee. No rental payments were to be made to New York Central as majority stockholder

man of the Board of Directors of Central, the President of Alleghany was also a director of Central, and the Vice President of Alleghany was also a Vice President of Central.

Shortly after the filing of this merger and lease application, SEC intervened in the proceeding (R. 190-191), and thereafter SEC submitted to ICC numerous petitions and memoranda, in every instance recognizing Alleghany's "carrier" status and ICC's jurisdiction over Alleghany, although suggesting that ICC in its discretion might wish to relinquish or share with SEC the admitted jurisdiction of ICC over Alleghany.

The appellees, Breswick and Phillips, filed with ICC a total of seven pleadings during the period from January 12, 1955 to June 1, 1955, all praying that ICC dismiss or deny Alleghany's requests (R. 269, 317, 392, 448, 478, 489, 537).* These pleadings took widely varying and frequently inconsistent positions. ICC permitted appellees to intervene for the purpose of considering the legal issues they had raised (R. 517).

On March 2, 1955, ICC's Division 4 issued its report and order (the first "status order") granting the merger and lease application (R. 414-446, 446-448). Since this order contained its own affirmative provision subjecting Alleghany to regulation under the Interstate Commerce Act, one of the ordering paragraphs terminated the June 5, 1945 C. & O. order (R. 447). ICC retained jurisdiction to make further orders (R. 447). Intervening stockholders and SEC applied for a rehearing (R. 448-449, 485-489, 489-492). On May 24, 1955, the full Commission issued its report and order (the second "status order") affirming Division 4 (R. 506-515, 516-517). With respect to the Bridge Company-Big Four merger and the accompanying

*The first pleading, filed by Lewis D. and John Gilbert (R. 269-281), was later adopted by appellees Breswick and Phillips (R. 491).

lease, ICC concluded that its jurisdiction over this type of transaction was "well established", and that Alleghany's joinder in the application was essential under *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944) (R. 514). The Commission affirmed the findings of its Division 4 that the application was thus within the scope of its § 5 jurisdiction to continue Alleghany in carrier status.

The full Commission rejected appellees' argument that Alleghany, if it controlled Central, had illegally acquired control without ICC approval (R. 511-514). The full Commission also agreed with Division 4 that appellees' argument that Alleghany did not control Central "ignores the realities of the situation" (R. 513). It referred to Alleghany's stock ownership and voting power, pointed out that the tenure of Alleghany's nominees as directors on Central's Board depended upon their conformance with the views of those who elected them, and concluded that "in our opinion the power thus reposing in Alleghany constitutes control of Central" (R. 513). ICC also found there was no need to order a hearing "for the reason that the intervenors [Breswick and Phillips] are concerned primarily with the interpretation of paragraphs (2) and (3) of § 5 of the act, and their application to the facts disclosed in these proceedings" (R. 508).

C. The Boston & Albany Proceeding

While the Bridge Company-Big Four proceeding was unfolding, Central and Alleghany applied to ICC on December 16, 1954 for approval of the acquisition by Central directly and by Alleghany indirectly of stock control of three rail carriers whose properties were theretofore directly or indirectly under lease to Central (R. 565-599). This proceeding (the "Boston & Albany" proceeding) resulted in a report and order of March 22, 1955 (R. 450-471, 471-473) approving such acquisition of stock control by Central

and Alleghany. Since Alleghany's status as a carrier subject to the Interstate Commerce Act had been provided for only twenty days earlier in the March 2, 1955 status order in the Bridge Company proceeding, the Boston & Albany order did not repeat that provision. Appellees did not attempt to intervene in the Boston & Albany proceeding.

D. Alleghany's Preferred Stock Exchange Offer and the Preferred Stock Orders

Alleghany's Board of Directors, in December 1954, realizing that there would have accumulated by May 1955 dividend arrearages aggregating $18,000,000—i.e., $132 on each of approximately 136,000 shares of Alleghany's outstanding 5½% preferred stock, Series A (the "old preferred stock")—called a stockholders' meeting to vote on charter amendments implementing a proposed voluntary exchange of new 6% convertible preferred stock (the "new preferred stock") for the old preferred stock (R. 282-286, 296). During January 1955, Alleghany, pursuant to the Securities Exchange Act of 1934, submitted proxy material to the SEC, and such changes as SEC suggested were adopted (R. 282-311, Unprinted Record, pp. 359, 843-844). On February 8, 1955, all classes of Alleghany's stockholders, after receipt of the proxy material, approved by large majorities the charter amendments which made possible the voluntary exchange offer. Of the common stock voted 97½% (over 70% of that class) registered approval (R. 79, 520, 648). Alleghany, after also processing the exchange offer itself with SEC (Unprinted Record, pp. 359, 843-844), mailed it to holders of the old preferred stock and applied to ICC under § 20a of the Interstate Commerce Act for authority to issue the new stock (R. 371-392).

The exchange offer by its terms terminated five business days after issuance of an appropriate ICC order (R. 333), until which time (June 6, 1955) holders of old

preferred stock were free to deposit with the Exchange Agent for exchange or, having deposited, to withdraw, their old preferred stock (R. 333, 521). After June 6, 1955, when holders of over 130,000 out of a total of 136,000 shares of old preferred stock had voluntarily accepted the offer (R. 647), these holders were bound to accept the exchange (R. 333, 521). The exchange was designed to make possible, by elimination of all preferred dividend arrearages, payment of dividends on the common stock for the first time in twenty-five years (R. 282, 294-295, 351).

On May 26, 1955 (two days after the second ICC status order) Division 4, after full consideration of intervenors' arguments in opposition, issued a lengthy report and the first of two ICC orders approving the exchange (the first "preferred stock order") (R. 518-536, 536-537). In so doing, it examined with care all aspects of the exchange offer and found it to be for lawful objects within Alleghany's corporate purposes and compatible with the public interest (R. 535).*

Just before the exchange would by its terms have been consummated, Messrs. Breswick, Phillips and Gilbert petitioned the ICC for reconsideration of the first preferred stock order (R. 537-544), thus automatically staying the effectiveness of the order until their petition for reconsideration was acted upon. The depositing preferred stockholders who, after June 6, 1955, could no longer withdraw from the exchange, were "frozen in", while ICC considered the intervening stockholders' petition for reconsideration.

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*Divison 4 exercised its power to modify the proposal in one respect. Whereas Alleghany's exchange offer contemplated that the ratio for converting new preferred stock into common would be fixed five days after an ICC order of approval, Division 4 conditioned its approval upon modification of the exchange offer to relate the conversion ratio to the price of the common stock the day prior to its order—this, "in order to eliminate the possibility of manipulation of the common stock prices." (R. 535)

fer standing upon the appellees in the present case on the ground that, but for the status order, Alleghany would have been regulated by the SEC would clearly depart from the holding in the *Shannahan* case.

The District Court in its preliminary opinion indicated that *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939), carved an exception from *Shannahan* and established the standing of these appellees to challenge the ICC status order in this case. This appears to misread the *Rochester* decision. The *Rochester* case permitted review, at the suit of a telephone company, of an FCC order holding the company subject to FCC regulation, the Court pointing out that the status order there immediately and automatically required the company's obedience to a variety of FCC requirements, including the filing of rates and contracts. It would follow at most from that decision that Alleghany, not its minority stockholders, might be sufficiently affected by the status order here to seek its review.

2. LACK OF STANDING TO CHALLENGE THE STATUS ORDER BECAUSE OF THE PREFERRED STOCK ORDER. The District Court's second opinion, although recognizing that "the status order, by itself, may not have been reviewable" (R. 661), nevertheless reached the conclusion that the nature of the order was somehow metamorphosed later when the preferred stock order was issued and thereby became reviewable at the suit of the appellees. This result seems strained indeed.

If the District Court believed that the preferred stock order threatened harm to the appellees sufficiently to be reviewable, review of the preferred stock order alone would have provided the appellees with complete practical protection; if the District Court found that the alleged injury to the appellees was real, it could prevent the injury by overturning the preferred stock order.

The concept that the reviewability of an administrative order may remain uncertain and be dependent upon subse-

quent administrative orders poses the gravest difficulties both to the practical working of the administrative system and to the conduct of private affairs. It was, of course, mere accident in this case that Alleghany's preferred stock application followed by only a few months its earlier application leading to the status order. If the District Court were correct, a status determination which was non-reviewable when made could become reviewable and possibly be annulled or modified years afterward as a result of judicial review of later administrative action. Completed transactions and business conduct pursued in good faith for many years in reliance upon the status determination could thus be invalidated.

The uncertainty to Government and business alike which thus results from the District Court's conclusion is surely to be avoided unless required by compelling reason or authority. No such reason or authority, indeed, no reason or authority at all, has been advanced by the District Court in support of its conclusion.*

B. Appellees Lacked Standing to Challenge the Preferred Stock Order

As we have demonstrated under Point A above, the fact that certain minority stockholders in a rail carrier holding company have exhibited a preference for SEC regulation as opposed to the Congressional choice of ICC regulation does not confer on them any standing under the Urgent Deficiencies Act to review an order of the ICC. The fancied "injury" being common to all investors, under the principles established by this Court with respect to such

*It has been held that even where a single administrative order is involved, standing to challenge one portion of the order does not confer standing to challenge the remainder of the order. *Arkansas Louisiana Gas Co.* v. *FPC*, 113 F. 2d 281 (5th Cir. 1940).

As a practical matter they are still frozen in today. The full ICC affirmed the Division 4 decision by order dated June 22, 1955 (the second "preferred stock order", R. 554).

In January 1956, subsequent to completion of the record below,* groups of preferred and common stockholders and warrant holders of Alleghany filed wth SEC applications requesting an SEC order that Alleghany's issuance of the new preferred stock did not require SEC approval or other action under the Investment Company Act or, in the alternative, that such issuance should be exempted under § 6(c) of the Investment Company Act.** On June 19, 1956, the Division of Corporate Regulation of SEC issued a recommended decision rejecting all arguments of appellees that Alleghany's exchange offer was unfair and concluding that the new preferred stock—assuming but not deciding that it required SEC approval under the Investment Company Act—should be exempted from that Act. *In the Matter of Alleghany Corporation,* SEC File Nos. 812-987, 812-988, 812-998.

On November 30, 1956, the SEC denied the foregoing applications, one Commissioner dissenting (SEC Investment Co. Act Release No. 2446). In so doing the SEC did not revoke its 1945 order recognizing that Alleghany was to be considered a carrier subject to the Interstate Commerce Act, nor did it retract its repeated recognitions of Alleghany's carrier status. The SEC merely asserted that upon the question of Alleghany's regulatory status it would abide by the District Court's decision "Unless and until the Su-

*See Appellees' Statement Suggesting Mootness and Motion to Dismiss or Affirm filed in this cause in this Court in March, 1956.

**Alleghany later joined in these applications without admitting SEC jurisdiction and without prejudice to this appeal. On the same basis, Alleghany, in December 1955, had re-registered with SEC as an investment company under the compulsion of the District Court's holding without prejudice to its right to pursue this appeal. See Alleghany's Brief in Opposition to Appellees' Statement Suggesting Mootness etc. filed in March, 1956.

review, a three-judge court is not an appropriate forum for the airing of the views of a disgruntled minority.*

Furthermore, the asserted injury on which the District Court based standing to challenge the preferred stock order is likewise insufficient. The court in its opinion on final injunction, apparently dissatisfied with its earlier reliance on the appellees' right to the "protection" of the Investment Company Act,** held that the preferred stock order was reviewable at the suit of the appellees on the ground that "a threatened harm exists here, since the right to convert the preferred into common stock may dilute the interest of plaintiffs as common stockholders of Alleghany" (R. 661).

The principal difficulty with the District Court's conclusion is its assumption that threatened economic detriment necessarily affords standing to challenge an administrative order which permits the detriment. As this Court has frequently pointed out, economic detriment alone does not confer standing to sue unless there is a threatened injury to some legally-protected right. *E.g., Moffat Tunnel*

*Appellees' counsel admitted below that the exchange order would actually benefit appellees as common stockholders of Alleghany. He told the District Court (R. 59):

> "Indeed, our [appellees'] interests are hurt by the injunction because they own common stock, they own no preferred stock, and the price of their securities would go the other way if the preferred stock is restrained."

**As indicated in 42 Va. L. Rev. 834, 836 (1956), the District Court's preliminary opinion reflects a misconception as to the scope of ICC regulation of carriers' securities issues (R. 611-612). Under the Act a carrier may not issue securities without specific ICC authorization, and such authorization can be given only after ICC investigates and finds that the carrier's proposed issue "is for some lawful object within its corporate purposes, and compatible with the public interest" and also fair to stockholders (49 U. S. C. § 20a(2); *Schwabacher* v. *United States*, 334 U. S. 182, 198-199 (1948)). ICC requires periodic reports showing the disposition of such securities and the application of the proceeds (49 U. S. C. § 20a(10)). In this very case ICC meticulously examined the preferred stock exchange offer and rejected all claims by appellees that the exchange offer was unfair (R. 533-535).

preme Court reverses the action of the District Court" (Id. at p. 9). The SEC ruled further that if, as the District Court held, Alleghany was within the coverage of the Investment Company Act, the SEC could not exempt Alleghany's preferred stock exchange offer from that Act because the "unclear and conflicting nature of the record" before the SEC did not permit a finding that the exchange offer would be in the interest of investors, a finding necessary to the grant of an exemption under § 6(c).

SUMMARY OF ARGUMENT

I

The contested ICC orders were not reviewable at the suit of appellees, minority stockholders of Alleghany.

Appellees had no standing to challenge the ICC status orders by virtue of their asserted interest in securing the "benefits" and "protection" of the Investment Company Act. That is an interest which, even if it had any foundation in fact, would be common to all investors in Alleghany. As such, under this Court's decision in *Pittsburgh and West Va. Ry.* v. *United States,* 281 U. S. 479 (1930), it is not an interest which confers standing to bring suit in a 3-judge court under the Urgent Deficiencies Act.

If the status orders were not reviewable at the time they were made, they did not become reviewable upon the later issuance of the preferred stock orders. A holding to the contrary would mean that administrative orders not reviewable when made, and completed business transactions entered into in good faith in reliance upon such orders, could be annulled years afterward as a result of judicial review of later administrative action.

Appellees likewise have no standing to challenge the preferred stock orders on the basis of their asserted in-

League v. *United States*, 289 U. S. 113 (1933). The appellees here had no legally-protected right to have their equity in Alleghany maintained against dilution. The preemptive rights which adhere to common stock in some corporations are expressly denied in Alleghany's charter with respect to common stock issued upon conversion of preferred (R. 383-384).

Indeed, Alleghany already had outstanding a class of 4% Convertible Preferred Stock issued, as was the new preferred stock issue, pursuant to an order of the ICC. The mere existence of one such issue gave ample notice to purchasers of its common stock of the possibility of further issues. In this, of course, they were no differently situated than the holders of common stock in a multitude of industrial or utility corporations, and had available to them the same remedies of resort to a single-judge court in the event of illegality or fraud on the part of their directors.* As this Court held in *Pittsburgh & West Va. Ry.* v. *United States*, 281 U. S. 479 (1930), however, such charges would have to be made in an action invoking the plenary equity jurisdiction of a single-judge court. See also *Otis & Co.* v. *Pennsylvania R. R.*, 61 F. Supp. 905 (E. D. Pa. 1945), *aff'd per curiam*, 155 F. 2d 522 (3d Cir. 1946).

The District Court apparently recognized that a threat of dilution would not in and of itself confer standing

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*The recent SEC decision of November 30, 1956 (SEC Investment Co. Act Release No. 2446) left undisturbed the finding of SEC's Division of Corporate Regulation that

> "In light of all the testimony concerning the history of the plan, its consideration by independent advisors, the nature and reasons for the various changes in the plan, and the lack of any evidence which would impeach the motives or actions of Young and Kirby as officers of the corporation with respect to the plan, or in Young's case in making purchases of stock, we cannot find any equitable reason why either Young or Kirby should be denied participation in the plan as one of a class of stockholders. Nor can we find, as suggested by intervenors, that motives or actions of these persons have resulted in any unfairness in the plan."

terest in the "benefits" and "protection" of the Investment Company Act. Such interest, as stated above, would be common to all investors in Alleghany. The possibility that the interest of appellees as common stockholders of Alleghany might at some future time be diluted through conversions of the new preferred stock into common could not confer standing. As this Court has repeatedly held, economic detriment alone does not confer standing unless there is a threatened injury to some legally-protected right. Appellees here had no legally-protected right against dilution because Alleghany's charter expressly denies them pre-emptive rights in connection with the conversion of preferred stock.

II

The 1945 order by which ICC asserted regulatory jurisdiction over Alleghany contained an express provision that the order was to continue in effect unless and until otherwise ordered by ICC. The 1945 order by which SEC relinquished jurisdiction over Alleghany and terminated its registration under the Investment Company Act provided that if Alleghany should cease to be subject to ICC regulation the SEC order might be revoked after notice and hearing. Under the provisions of the Interstate Commerce Act (particularly § 15(2)) and the Investment Company Act (particularly §§ 38(a) and 3(b)(2)) the orders even without these provisions would have continued effective until revoked by ICC and SEC respectively. Therefore, neither Alleghany's sale of its C. & O. stock nor any other factual change could automatically revoke the orders and cause ICC jurisdiction to cease and SEC jurisdiction to attach.

Both ICC and SEC have continuously given their 1945 orders, and the statutes which they respectively administer, an interpretation contrary to the decision of the court below.

upon appellees. It stated that dilution supported standing only because it resulted from an issuance of stock pursuant to a void ICC order (R. 661, n.11). The demonstration elsewhere in this brief that the ICC did have power to issue the preferred stock order demolishes the foundation on which appellees' standing was based.

The appellees clearly have no standing to challenge under the Urgent Deficiencies Act the ICC orders here in issue.

POINT II

THE DISTRICT COURT'S NOVEL THEORY OF AUTOMATIC LOSS OF JURISDICTION BY ICC DISREGARDS THE CLEAR TERMS OF BOTH ICC AND SEC ORDERS AND THWARTS ORDERLY REGULATION BY ADMINISTRATIVE AGENCIES.

The District Court's concept of automatic lapse of valid continuing orders of regulatory agencies is in startling contrast to the sensible and orderly resolution of the problem of potentially conflicting jurisdictions worked out by the SEC and ICC in the case of Alleghany. Their orders recognize that, particularly where jurisdiction depends upon such intricate factual determinations as the existence or termination of control by one corporation over another, it is far more desirable that the agencies concerned investigate and determine the pertinent facts, releasing jurisdiction if appropriate, than that regulated persons be free to make their own decisions as to whether they need continue to obey orders previously entered. We submit that in these times of intricate economic and industrial relationships the solution achieved by the action of the SEC and the ICC is the only tenable method of regulation. Supervision by a regulatory commission is not something to be switched on and off at the whim of the person to be regulated.

With this in mind, on June 5, 1945 the ICC ordered that Alleghany must conduct itself as a carrier "unless and until

Their continuous administrative interpretation of the statutes is entitled to great weight, and their interpretation of their own orders is controlling. These interpretations were in effect disregarded by the District Court even though its opinions make plain that it neither regarded the 1945 orders as ambiguous nor considered the statutory provisions so unambiguous as not to be susceptible of the interpretation given them by ICC and SEC.

The District Court's view that factual changes can render administrative status orders automatically ineffective, and shift a company back and forth from one regulatory agency to another without further order of either agency, would introduce chaotic uncertainty and confusion into administrative regulation. Under the District Court's theory neither the administrative agencies involved nor the regulated company would know from day to day which agency was in charge. This is particularly true where jurisdiction depends upon such complex and variable factors as corporate control. In this very case issues were raised by intervenors as to whether Alleghany did not actually continue in control of C. &. O. even after disposing of its C. & O. stock; and the District Court itself, after naming in successive opinions three different dates on which the change of facts asserted by it to have nullified the 1945 orders occurred, finally gave up trying to specify any particular date and simply said that the automatic nullification occurred "at the latest" on May 24, 1955—only two days before the issuance of ICC's order approving Alleghany's exchange of securities.

Even if the 1945 ICC and SEC orders were to be disregarded, the decision of the court below would be erroneous. The sole test for determining whether Alleghany is within the coverage of the Investment Company Act is contained in § 3(c)(9) of that Act, and that test is whether Alleghany is "*subject to* regulation under the Interstate Commerce Act." The Investment Company Act exemption does not

otherwise ordered by this Commission" (R. 185). Similarly, the SEC, by order dated October 4, 1945, terminated the registration of Alleghany under the Investment Company Act of 1940, providing that if in the future Alleghany's status changed "this order may be revoked, suspended or modified *after appropriate notice and opportunity for hearing*"* (R. 186).

For this logical and orderly procedure, the District Court has substituted a sort of jumping jack theory of regulatory jurisdiction—holding that at some point or other, as yet undetermined, the restraints of the ICC order vanished and Alleghany suddenly jumped over to the jurisdiction of SEC.

It is not surprising that the District Court did not cite a single decision or precedent for its novel and, we believe, clearly erroneous result. Not only did adoption of this course require application of an inadmissible theory of lapse to ICC orders; the court had to cut the 1945 SEC order in half, and give both halves an interpretation adverse to Alleghany, before it could invoke § 7 of the Investment Company Act to invalidate Alleghany's new preferred stock issue. The District Court in effect set aside the half of the SEC order that recognized ICC jurisdiction, but kept alive the half that took away Alleghany's Investment Company Act registration.

A. The Decision Below Erroneously Ignores the Administrative Determinations of Both ICC and SEC.

Both ICC and SEC have repeatedly recognized and acted upon the assumption that their orders continued in effect unless and until changed by them. Their views should have carried great weight; any other course cuts the moorings of responsible administrative rulings and sets them spinning beyond control.

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*Emphasis in quotations is ours throughout this brief unless otherwise indicated.

depend on the nature or extent of the regulation actually imposed or on the particular form of ICC order or the particular section of the Interstate Commerce Act under which such regulation occurs. It depends solely on Alleghany's being "subject to" regulation under the Interstate Commerce Act.

The decision below (on reargument) recognized that Alleghany was subject to the regulatory power exercised by ICC in March 1955 in taking jurisdiction over the acquisition by Alleghany and Central of stock control of the Boston and Albany Railroad Company and two other railroad carriers. This being so, there can be no question that Alleghany was "subject to regulation under the Interstate Commerce Act" and therefore exempt from the Investment Company Act when the 1955 ICC orders here in issue were promulgated.

III

ICC has power under § 5(3) of the Interstate Commerce Act to regulate as a carrier a non-carrier which has participated in an "acquisition of control" of carriers within § 5(2) of the Act. ICC had power in this case to issue the orders subjecting Alleghany to carrier status because the Bridge Company merger and lease and the Boston & Albany acquisitions each did involve "acquisitions of control" by Alleghany within § 5(2) of the Act. A non-carrier which has thus been subjected to carrier status by the ICC may not, by virtue of Section 20a of the Interstate Commerce Act, issue securities without the approval of the ICC. The ICC in this case had power to issue the orders approving Alleghany's new issue of preferred stock, since Alleghany had been validly subjected to carrier status by the ICC in the Bridge Company proceeding, and, in effect, in the Boston & Albany proceeding.

The merger of the Bridge Company properties into Big Four, a subsidiary of Central, and the inclusion of

In January 1954 Alleghany in a letter to ICC raised questions as to the effect of Alleghany's sale of C. & O. on the ICC's 1945 order and was formally notified that the order could not be regarded as changed unless and until so ordered by the Commission (R. 186-188). That this was continuously the ICC's view is indicated by the fact that the ICC found it necessary in June 1954 to issue to Alleghany an order to show cause why the 1945 order should not be vacated (R. 188-189). That order to show cause ultimately resulted in the ICC decision of March 2, 1955 in which the ICC stated that "without our further order, the voluntary action of Alleghany * * * could not operate to alter the status of Alleghany as a carrier subject to the Act * * * Alleghany's status as a carrier cannot be modified or otherwise altered unless and until we order an appropriate change" (R. 424).

The SEC has similarly recognized the continuing effect of its own 1945 order and the persistence of ICC's jurisdiction over Alleghany. In July, 1954, shortly after the ICC had called upon Alleghany to show cause why its 1945 order should not be terminated, SEC commenced a parallel proceeding to determine whether its own 1945 order should be revoked, modified, or suspended (R. 428-429). When Alleghany objected to going forward in both agencies at the same time, the SEC postponed its proceeding under a stipulation with Alleghany which provided that if the ICC should revoke its 1945 order in such manner as to relieve Alleghany from compliance with the Interstate Commerce Act, then pending the conclusion of the SEC proceeding Alleghany would not, without SEC approval, engage in any act which would be prohibited by the Investment Company Act (R. 429, Unprinted Record 2344-2345). The SEC never went further with its proceeding. This stipulation clearly recognized that Alleghany would not revert to the status of an investment company subject to the Investment Company Act unless and until the ICC and SEC orders

those properties in a lease by Big Four to Central, constituted an indirect "acquisition of control" by Alleghany as parent of Central. The fact that the Bridge Company was already indirectly under Alleghany's control did not remove the transaction from the scope of § 5(2). The District Court's restrictive view as to what constitutes an "acquisition of control" within § 5(2) conflicts with the all-inclusive statutory definition of "control". Moreover, this Court's holding in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12 (1932), that an intra-system rearrangement or tightening of control is an "acquisition of control" within § 5(2) insofar as an acquiring carrier is concerned, applies with equal force to the identical "acquisition of control" language in § 5(2) applicable to non-carriers.

The Bridge Company transaction constituted an acquisition of control by Alleghany because it resulted in a tightening of Alleghany's control of its subsidiaries. Control being a matter of degree, a tightening of control is an acquisition of additional control and comes within § 5(2).

The practical consequences of holding that a non-carrier parent is not subject to ICC regulation when its carrier subsidiary participates in a § 5(2) transaction, support the conclusion that such a result was not intended by Congress. The necessity of subjecting a non-carrier parent to ICC jurisdiction in order for ICC to consider and approve an acquisition of carrier properties by the parent's subsidiary was made clear by this Court in *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944). Since 1920 ICC has not deviated from its construction of § 5(2) as requiring its approval of intra-system rearrangements of control, and for at least the past ten years, following this Court's 1944 decision in the *Marshall Transport* case, ICC has consistently required holding company parents of carriers to join in any application for internal rearrangement of the controlled system.

were appropriately modified. Memoranda filed by the SEC as an intervenor in the ICC proceedings relating to Alleghany repeatedly recognized that Alleghany continued subject to ICC jurisdiction unless and until the ICC changed its 1945 order (R. 191, 192, 251-252, 255, 485-486, 508-9).*

In regular course in January and February, 1955, Alleghany submitted to the SEC, under the Securities Exchange Act of 1934 (not under the Investment Company Act), the proxy material relating to its proposed preferred stock exchange offer and the exchange offer itself. The proxy material and the exchange offer both (R. 282-311) called attention to the necessity of ICC approval of the exchange, and although the SEC made suggestions which were incorporated in these documents it did not deny ICC jurisdiction over Alleghany or suggest that Alleghany had automatically reverted to Investment Company Act status (R. 288-289). Later, in June, 1955, when the New York Stock Exchange authorized trading in Alleghany's new 6% preferred stock on a when-issued basis without requiring registration of the stock under the Securities Act of 1933 (R. 77), the SEC raised no objection, although exemption from such registration was dependent upon ICC jurisdiction over Alleghany and was inconsistent with any theory that Alleghany had reverted to SEC jurisdiction.**

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*These actions of the SEC completely refute the assertion of the court below that the SEC intended its 1945 order as merely a "formal recognition" (R. 657) of the status conferred on Alleghany by the 1945 ICC order, and therefore terminable automatically whenever the ICC order terminated.

**See SEC Rule X-12A-5, 17 CFR, 1955 Supp., § 240.12a-5 under the Securities Exchange Act of 1934, and § 3(a)(6) of the Securities Act of 1933, 15 U. S. C. § 77c(a)(6). SEC Rule X-12-A-5 requires, in order to render lawful transactions on a when-issued basis, that: "A registration statement is in effect under the Securities Act of 1933 * * * or the terms of any applicable exemption from registration under such Act have been complied with, if required." Section 3(a)(6) of the Securities Act of 1933 exempts from registration "Any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act."

The District Court also erred in concluding that ICC approval of Alleghany's control of Central was necessary to the orders here under review. For one thing, the court misread § 5(2) in assuming that ICC approval of Alleghany's control of Central was necessary before ICC could assert jurisdiction over Alleghany in the Bridge Company proceeding. Secondly, Alleghany's control of Central was not a transaction which required ICC approval. Section 5(2) does not require approval of a noncarrier's acquisition of control of a single carrier, and analysis of the statute demonstrates that no different result is intended for an acquisition of an integrated system which happens to include subsidiaries. In neither case is there any bringing together of carriers affecting the public interest. To hold otherwise and require ICC approval of any change of management would as a practical matter make it impossible to conduct a successful proxy contest and would be a serious restriction on corporate democracy.

The legislative history of § 5 confirms that the Bridge Company merger and lease was a transaction within the statute and that Alleghany's acquisition of Central was not. Section 5(2) was designed by Congress to subject holding companies to ICC control whenever their activities involve consolidation of railroad companies or of railroad properties, without regard to whether the consolidation is of properties already in some way controlled. Moreover, when Congress used the terminology of "acquisition of control" in enacting § 5(2) in its present form in 1933, it must be taken to have used it in the light of ICC's prior administrative interpretation of the language as encompassing a change in the form of control over a previously controlled carrier. Knowledge of this administrative interpretation was brought home to Congress, through ICC decisions and ICC annual reports to Congress, before Congress reenacted the "acquisition of control" language in 1933.

The legislative history discloses also an emphatic rejection of the notion that ICC approval is required for acquisitions of ownership control by holding companies where, as in the case of Alleghany's ouster of the Central management, there is no resulting consolidation of carriers or carrier properties.

ICC's power to issue the contested orders flows not only from the Bridge Company-Big Four transaction, but from the Boston & Albany transaction as well. ICC there approved, before it issued the orders here under review, a newly-acquired stock control by Central and Alleghany, a transaction within the express language of § 5(2) even under the District Court's reading of the Section. The fact that ICC in the Boston & Albany order did not repeat a § 5(3) provision declaring Alleghany subject to carrier status, which was already contained in an ICC order issued three weeks earlier, but instead referred to the earlier order, cannot oust ICC jurisdiction.

IV

In the proceedings which resulted in the ICC orders here in issue, appellees were given reasonable opportunity to be heard and they voluminously presented their views in affidavits, memoranda and briefs. They were entitled to no hearing beyond that accorded them by the ICC.

Section 5(2)(b) of the Interstate Commerce Act expressly provides that in § 5 proceedings the application shall be set for public hearing "if the Commission shall consider it necessary" and that a public hearing shall be held in cases involving railroads unless "the Commission determines that a public hearing is not necessary in the public interest."

The court below erred in drawing from § 17(3) of the Interstate Commerce Act, which provides that all ICC hearings shall be public on the request of any party interested, the deduction that despite ICC's clear discretion

under § 5(2)(b) to dispense with a public hearing, it was nevertheless required to give appellees an "evidentiary non-public hearing". Public hearings are the sole subject matter of § 17(3) and the only type of hearing provided for in § 5(b)(2), and that is the very type of hearing the ICC is expressly authorized by § 5(b)(2) to omit.

The court below was inconsistent in holding that the appellees were entitled as of right to a further evidentiary hearing in the ICC status proceeding, while at the same time conceding that "plaintiffs perhaps suffered no injury" from the status order and that therefore "the status order, by itself, may not have been reviewable" but only became reviewable as a result of ICC's later preferred stock orders. The appellees obviously could not be entitled to a hearing in the status proceeding because of something which happened after the proceeding was concluded.

The District Court also erred in holding that the ICC's findings as to Alleghany's control of Central were ambiguous in form and not sufficiently supported by the evidence. The ICC found in the most categorical and unqualified terms that "Alleghany by stock ownership and by the favorable action of the stockholders acquired control of Central", and no other finding was possible in view of the evidence before the ICC as to Alleghany's substantive voting power and the interlocking officers and directors of Alleghany and Central.

V

Even on the erroneous assumption that the ICC was without jurisdiction to approve Alleghany's preferred stock issue, the court below erred in enjoining Alleghany and its representatives from issuing, distributing or transferring the new preferred stock. The power of the District Court under the Urgent Deficiencies Act was limited to enforcing or setting aside orders of the ICC. The court went far

beyond any power committed to it when it also issued an injunction nullifying an order of the SEC, purportedly enforcing the Investment Company Act and interfering with a corporate stock issue in mid-stream.

In any event, Alleghany's preferred stock exchange offer has been found fair and approved by the ICC and the overwhelming vote of Alleghany's stockholders. As a result of the District Court's assumption of power to enjoin the issue, Alleghany is prevented from paying preferred dividends, electing directors or holding its annual meeting, and thousands of its innocent preferred stockholders have been deprived of the use of their capital and subjected to extreme hardship because of the unmarketability of their stock and its unacceptability as collateral for loans. In some cases this could mean financial ruin. The injunction was beyond the power of the District Court and an abuse of discretion even if jurisdiction had existed, and it should be vacated at the earliest possible date.

ARGUMENT

POINT I

THE CONTESTED ICC ORDERS WERE NOT REVIEWABLE AT THE SUIT OF APPELLEES.

This appeal presents at the threshold the question whether the contested ICC orders were reviewable by the three-judge District Court at the suit of the appellees, as minority stockholders of Alleghany.* The appellees here did not establish that they were threatened with any direct and immediate injury peculiar to them alone, and not shared by all of the other investors in Alleghany, which could pos-

*The action was commenced in a specially-constituted three-judge District Court pursuant to the Urgent Deficiencies Act, which requires that actions to enforce, suspend, enjoin, annul or set aside ICC orders be brought before such courts. The term "Urgent Deficiencies Act" is used herein, as it was by the court below, to refer to §§ 1336 and 2321-2325 of the Judicial Code (28 U. S. C. §§ 1336, 2321-2325) which have succeeded the original Urgent Deficiencies Act (38 Stat. 219 (1913)).

sibly sustain the extraordinary relief sought and awarded below. The judgment of the District Court must therefore be reversed for appellees' want of standing.

In its preliminary opinion granting the appellees' motion for interlocutory injunction the majority in the District Court held the contested ICC orders reviewable at the suit of the appellees because of the appellees' claim of right to the "benefits" and "protection" of having Alleghany regulated by the SEC under the Investment Company Act, rather than by the ICC under the Interstate Commerce Act (R. 607-612). In its second opinion, the District Court adhered to its ruling that the appellees had standing, but shifted ground so as to base standing upon the possible remote dilution of the appellees' interest as common stockholders of Alleghany which might result upon conversion of the preferred stock into common (R. 660-661). Even that "dilution" was thought not sufficient to support standing in the appellees if it had resulted under SEC, rather than ICC, jurisdiction (R. 661, n. 11). With respect to the status order, the court conceded that "the plaintiffs perhaps suffered no injury" thereby, and that "the status order, by itself, may not have been reviewable," but held that the preferred stock order was reviewable and that the reviewability of the preferred stock order conferred reviewability upon the status order (R. 661).

We shall demonstrate below that the court was wrong in each of these conclusions. It is not our position that minority stockholders are without judicial remedy under any circumstances to challenge a stock issue by their corporation. If an issue of securities is fraudulent or a breach of the fiduciary obligations of the management, minority stockholders may proceed in the usual way to invoke the equity jurisdiction of the District Court. In that event the case is triable to a single judge and the usual course of appellate review is available. But the right to tie up three judges and have an extraordinary direct appeal to this Court is

of the lessors. The District Court held that the plaintiff in its capacity as a minority stockholder of the lessee (New York Central) had no standing under the Urgent Deficiencies Act to challenge the ICC order, since any injury to plaintiff in that capacity was a derivative injury suffered by the corporation and common to all of its stockholders. The plaintiff was permitted to sue, however, in its capacity as a minority stockholder of the lessor corporations, because the provision for the payment of dividend rentals to the minority, as a special class, gave them "a new interest of a substantially independent character" which was not shared by the other stockholders (54 F. 2d at 126).* Nothing in this Court's opinion affirming the District Court suggests the contrary.

As shown by Judge Hincks in his dissent below, the independent interest peculiar to the minority stockholders of the lessors in the *New York Central Securities* case was quite different from the appellees' "claim of right to protection under the Investment Company Act" in the present case (R. 630-631). That claim is in no sense peculiar to the appellees, or to the minority common stockholders of Alleghany, or even to all the common stockholders. It is a claim which, even if it were valid, would be shared by all classes of investors in Alleghany. It therefore can not support standing under the Urgent Deficiencies Act.

To base standing here on the appellees' interest in the benefits of the Investment Company Act would require a determination that the appellees' interest would be better served were Alleghany regulated by SEC rather than ICC.

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*In *Schwabacher* v. *United States*, 334 U. S. 182 (1948), the minority stockholders likewise had an interest of a substantially independent character because the applicable state law and the corporate charter gave them a right of dissent and of appraisal in connection with the merger involved in the case, which right was removed by the ICC order there in question.

and that the failure to achieve SEC regulation threatens the appellees with direct and immediate harm. This would set the courts at large in an area where Congress has spoken and must necessarily have the last word. Congress has declared that carriers and related companies "subject to regulation" by the ICC are to be regulated by it and not the SEC. This Congressional choice ought not to be overridden merely because minority stockholders would prefer a different forum for the threshing over of their grievances. Judicial assessment of a claim of injury of this nebulous type would embark the Court upon a hypothetical determination, of a type traditionally declined, as to the relative merits of SEC versus ICC regulation in the completely abstract context of which better "protects investors." This Court has recognized in this general area that the judiciary has "neither aptitude, facilities nor responsibility" to conduct that kind of inquiry. *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948).

The reviewability of administrative status orders even at the suit of the corporations to which they are directed has been narrowly circumscribed by this Court. In *Shannahan* v. *United States*, 303 U. S. 596 (1938), the Court held non-reviewable an ICC determination that a carrier was subject to the Railway Labor Act and to the powers of the National Mediation Board thereunder. In so doing, the Court pointed out that the ICC status determination did not command or direct anything, and said that "the determination of a status or similar matter is not action subject to review under the Urgent Deficiencies Act" (303 U. S. at 602).* To con-

*Although the *Shannahan* case involved a status determination rather than a formal order, the court held that the determination would have been non-reviewable even if it had been an order. The case has been cited by this Court as authority for non-reviewability of status orders by those who are not adversely affected thereby. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130 (1939).

Finally, in the August 1, 1955 memorandum filed by the SEC with Mr. Justice Harlan, incompletely quoted in the opinion of the court below, the SEC stated:

> "Our position before the ICC has always been the same, to wit, that Section 5(3) of the Interstate Commerce Act permits the ICC in its discretion to limit its assumption of jurisdiction over Alleghany."

The SEC's decision of November 30, 1956, referred to above, does not indicate any change in this view, but merely asserts that upon the question of Alleghany's regulatory status the SEC must abide by the decision of the court below "Unless and until the Supreme Court reverses". (SEC Investment Co. Act Release No. 2446, p. 9)

Thus, the decision below denying ICC jurisdiction rides roughshod over the views of the two administrative agencies entrusted with the administration of the Investment Company Act and the Interstate Commerce Act. The District Court has overturned not only the administrative interpretation of the statute but even the administrative agencies' interpretation of their own orders.

A recent decision of this Court establishes that an administrative agency's interpretation of its own orders is the "ultimate criterion" and is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation". *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 414 (1945); see also *United States* v. *Western Pacific R. R.* (U. S. Sup. Ct., December 3, 1956).

Alleghany's position merely requires reading the ICC and SEC orders to mean what they say. It is not our argument that administrative agencies lack power to provide that their orders shall cease to be effective on a date certain or on the occurrence of a stated event. In this very case, for example, the ICC's order *could* have provided that it should cease to be effective if Alleghany

ceased to control C. & O. or other carriers, and in that event cessation of control would have automatically terminated the order. But the ICC chose not to proceed in that way here. Obviously it did not wish to leave the question of control or the question of ICC jurisdiction to be determined by Alleghany itself. It therefore provided that Alleghany should remain subject to the ICC order unless and until the ICC changed it.

Among the clearest of the many cases recognizing that agency orders continue effective in accordance with their terms are those arising under laws administered by SEC. In *SEC* v. *Long Island Lighting Co.*, 148 F. 2d 252 (2d Cir. 1945), judgment vacated on grounds of mootness, 325 U. S. 833 (1945), it was recognized that an SEC order granting an exemption from the Public Utility Holding Company Act continued until revoked, and that, therefore, even at a time when SEC was conducting a proceeding to determine whether the exemption should be revoked, the court should not enjoin at SEC's behest action by the exemptee, approved by the New York Public Service Commission, the regulatory body of competing jurisdiction.

The court below purported to distinguish the *Long Island* case on the ground that SEC there exercised discretion in granting the company an exemption, whereas in granting exemption to Alleghany, SEC exercised no discretion but complied with a mandatory requirement of § 3(c)(9) (R. 659-660). This distinction is not a valid one and has not been drawn in any previous case so far as we have discovered. It is a distinction which would only add to the uncertainty and confusion inherent in the District Court's theory of automatic collapse of administrative orders. The question as to when an administrative order is discretionary, and when mandatory, is not a simple one and frequently involves complexities of both fact and law; indeed, the same order may be partly mandatory and partly

discretionary.* Under the District Court's theory, a regulated company would not only have to decide at its peril whether the facts had changed sufficiently to collapse an administrative order but, in addition, whether the order was of the collapsible type. This is both unfair to a company and at odds with the agency's orderly discharge of its administrative function.

The *Long Island* decision of the Second Circuit was in accord with the earlier decision of the same court in *Morris* v. *SEC*, 116 F. 2d 896 (2d Cir. 1941).

In *In re The United Corporation*, 128 F. Supp. 725 (D. Del. 1955) it was argued that United, though a registered holding company under the Public Utility Holding Company Act, had so changed its character as to become a pure investment company. But the court said that what alone was significant was that United was a registered holding company and that its registration "remains in effect until the SEC issues an order * * * terminating such registration upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors" (128 F. Supp. at 738). The court thus refused to embrace a view that a company might automatically pass from regulation under one statute to regulation under another, even when both were administered by the same agency, without an order directing the change. The District Court here said only that "we do not agree" with this aspect of the *United* holding (R. 660).

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*It would appear that SEC's 1945 order recognizing Alleghany's carrier status and terminating its investment company status *was* discretionary, at least in part, because § 8(f) of the Investment Company Act, under which the order was issued, permits the imposition of conditions in such orders. The SEC's failure to impose any conditions in its 1945 order was thus in itself an exercise of discretion.

B. Express Statutory Provisions Continue Both the ICC and SEC 1945 Orders in Force Until Appropriately Terminated by the Respective Agencies.

1. SECTION 15(2) OF THE INTERSTATE COMMERCE ACT. In holding ICC's 1945 order "inoperative" at some uncertain date, the District Court's opinion collides with § 15(2) of the Interstate Commerce Act which provides:

> "Except as otherwise provided in this chapter, all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, *and shall continue in force until its further order*, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction."

The District Court held this unambiguous provision inapplicable on the ground that § 15 as a whole appears under the general heading "Determination of rates, routes, etc.; routing of traffic; disclosures, etc."; that it must be read in connection with § 15(1); and that, as so read, it relates "solely to rate orders or the like" (R. 655).

This restriction of § 15(2) disregards its plain language. Section 15(2) refers to "all orders," not all "rate orders or the like." Moreover, the opening clause—"Except as otherwise provided in *this chapter*"—attests its relevance to all orders under Part I of the Interstate Commerce Act (that being the "chapter" referred to) not merely to orders under § 15(1) of the Act.*

*Examples of ICC orders within the opening exception clause are: under § 1(15) orders relating to car shortages under emergency conditions may take effect immediately; under § 15(7) an order suspending rates may take effect at once, but the suspension order may not endure longer than 7 months beyond the time when the rates would otherwise go into effect.

A case in point is *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519 (1947). That case dealt with § 17 of the Interstate Commerce Act which has twelve subdivisions and appears under the general heading "Commission procedure; delegation of duties; rehearings". Subdivision (11) provides that representatives of employees of a carrier may intervene and be heard "in any proceeding arising under this Act affecting such employees." The Brotherhood of Railroad Trainmen claimed a right to intervene in a suit brought against the railroad in a Federal District Court under § 16(12) of the Interstate Commerce Act and was met with the objection that § 17(11) did not permit such intervention in a court proceeding since it must be read in conjunction with the heading and the other subdivisions of § 17 and interpreted as permitting intervention only in proceedings before the Commission.

This Court upheld the Brotherhood's right of intervention. It recognized that § 17 was concerned primarily with Commission organization and administrative disposition of matters within its jurisdiction. The Court also adverted to the fact that at least 10 of the 12 paragraphs of § 17 deal with those matters and that prior to the revision of § 17 in 1940 all five of its paragraphs related exclusively to those matters. Nevertheless the Court held that § 17(11) must be enforced as written, saying in part (331 U. S. at pp. 528-529):

> "Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.* * *

> "Here the meaning of § 17(11) is unmistakable on its face. There is a simple, unambiguous reference to 'any proceeding arising under this Act' or, as the House committee paraphrased it, to 'any proceedings arising under part I.' There is not a word which would warrant limiting this reference so as to allow intervention only in proceedings arising under § 17 or in proceedings before the Commission."

In the present case the District Court relied heavily on the legislative history of § 15(2) in holding it applicable only to "rate orders and the like" mentioned in the general heading. Actually this history confirms the applicability of § 15(2) in this case. Prior to the Hepburn Act of 1906, ICC was confined to determining that *past* rates were unlawful, and lacked power to prescribe reasonable maximum rates for the future. See 1 Sharfman, *The Interstate Commerce Commission* (1931), pp. 45-46. The Hepburn Act, in granting ICC the all-important new power in § 15(1) to fix maximum rates for the future limited the duration of such ICC rate orders to two years. 34 Stat. 589 (1906); see *National Hay Ass'n* v. *Michigan Central R. R.*, 19 I. C. C. 34 (1910).

ICC before the Hepburn Act acted on the assumption that all its orders continued to be effective until its further order, and after the Hepburn Act that all but rate orders so continued. *E.g., Independent Refiners' Ass'n* v. *Pennsylvania R. Co.*, 6 I. C. C. 449 (1896); *Traugott Schmidt & Sons* v. *Michigan Central R. R.*, 23 I. C. C. 684 (1912); *ICC* v. *Louisville & N. R. Co.*, 73 Fed. 409, 428 (M. D. Tenn. 1896). The inclusion of specific language in § 15(1) limiting the effect of rate orders to two years was a recognition that there was no such restriction on the duration of other ICC orders.

In this situation when, at the ICC's request, Congress in the Transportation Act of 1920 removed the two-year

limitation on rate orders in § 15(1), it was placing them on a parity with most other ICC orders. The simplest and most certain way of accomplishing this was to delete the limitation from § 15(1) and declare in a new but immediately following subsection that "all" orders of ICC would be effective until further order unless the order itself otherwise provided. Thus, while the District Court could accurately state that "the legislative record makes clear that ICC sought the amendment because of questions relating to the duration of its rate orders" (R. 655) and this was the focal point of the discussion in Congress, there is no basis for a conclusion that the purpose was to confine the new § 15(2) to rate orders. Had Congress so intended, it would have continued the provision applicable to rate orders in the body of § 15(1), consistent with its prior action in placing the two-year limitation there. Instead Congress wrote a separate § 15(2) and in plain language declared that, except as otherwise provided in the statute, "all orders of the commission * * * shall continue in force until its further order * * *."

The error of the District Court's analysis is disclosed by its comments on the addition of this new subsection. It said (R. 656):

> "Moreover, before 1920, there was no separate subsection 2 in Section 15. A similar provision was imbedded in a paragraph in Section 15 relating solely to rate regulation and the like, and it would have been difficult to argue that such provision applied to ICC orders issued under other sections of the Act."

The fact which the court overlooked is, of course, that this "similar provision" imbedded in § 15(1) limited to two years the duration of future rate-fixing orders. In removing this limitation on rate orders and providing that *all* orders should continue by their terms, it was natural that

Congress would embody the new provision in a separate paragraph.

Congressional intention with respect to the applicability of § 15(2) to all ICC orders under Part I of the Interstate Commerce Act is otherwise apparent. Section 15(2) has almost verbatim counterparts in § 221(b) of Part II (applicable to motor carriers) (49 U. S. C. § 321(b)), in § 315(d) of Part III (applicable to water carriers) (49 U. S. C. § 915(d)), and in § 416(c) of Part IV (applicable to freight forwarders) (49 U. S. C. § 1016(c)). There is no question but that these provisions apply to all orders issued under their respective Parts.* There is no reason to suppose that Congress intended a sharp differentiation between ICC regulation of railroads on one hand (with only rate orders continuing in accordance with their terms) and motor carriers, water carriers, and freight forwarders on the other hand (with all orders continuing in accordance with their terms). Congress emphasized the inadmissibility of such an interpretation when enacting the Transportation Act of 1940. Both § 221(b) as to motor carriers and § 315(d) as to water carriers were referred to as intended to correspond with the similar provision of § 15(2) relating to rail carriers. See H. Rept. 2832, 76th Cong., 3rd sess., p. 81; H. Rept. 1217, 76th Cong., 1st sess., p. 25.

Apart from legislative history, the *Chicago Junction Case*, 264 U. S. 258, 270 (1924), explicitly recognizes § 15(2) as applicable to § 5 orders. The court below so recognized here but pointed out (R. 655) that in the later *United States* v. *American Railway Express Co.*, 265 U. S. 425, 430, n. 3 (1924), Justice Brandeis (who also wrote the *Chicago Junction* opinion) said: "Paragraph 2 of Section 15 deals only with the time when orders under para-

*In *Crescent Express Lines* v. *United States*, 320 U. S. 401, 404-405 (1943), this Court held § 221(b) applicable to a motor carrier order which had no concern with rates. Sections 15(2) and 221(b) are the same.

graph 1 take effect." It is evident that this observation in a footnote was not intended to have such a sweeping effect as the court below gave it. Its context shows that Justice Brandeis was not limiting § 15(2) to orders under § 15(1), but was merely stating the impact of § 15(2) on such orders since it was an order under § 15(1) that was there being considered.*

The foregoing analysis makes it plain that § 15(2) applies to all ICC orders under Part I of the Interstate Commerce Act, and that the District Court erred in restricting its effect to rate orders. Moreover, § 15(2) is simply a codification of what would in any event be the law in the absence of Congressional enactment to the contrary.**

2. STATUTORY PROVISIONS RELATING TO SEC ORDERS. Not only did the SEC order, which was never revoked, provide that it should continue in effect until further order of SEC, but the Investment Company Act, like the Interstate Commerce Act, so provides. The SEC, no less than ICC, has power to include in its orders provisions as to when the orders shall take effect, and how long they shall endure. Section 38(a) of the Investment Company Act gives SEC "authority from time to time to make, issue, amend, and rescind * * * such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission." Section 3(b)(2) of the same Act provides that

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*In the still later opinion of Mr. Justice Brandeis in *Minneapolis & St. Louis R. Co.* v. *Peoria & Pekin Union Ry. Co.*, 270 U. S. 580 (1926), the Court appeared to accept an argument by appellant in the case that § 15(2) applied to orders other than rate orders.

**The court below also strangely considered it "noteworthy" that § 16(6) dealing with suspension or modification of ICC orders contains no clause continuing them in effect until such suspension or modification (R. 656). But the ICC could hardly suspend or modify an order not still in effect. Section 16(6) merely confers on the ICC express authority to suspend or modify its orders. It was unnecessary to repeat in that Section the provision already made in § 15(2) that such orders should continue in force until so suspended or modified or until suspended or set aside in one of the other ways mentioned in § 15(2).

when the SEC finds that the circumstances which gave rise to issuance of an exemption order no longer exist the Commission shall "by order revoke such order." There is no room for some new doctrine of revocation by lapse applicable to SEC orders any more than to ICC orders.

3. ICC TERMINATION OF 1945 ORDER. The court below held in the alternative that even if § 15(2) kept the ICC's 1945 order in force until revoked by the ICC, the order disappeared on May 24, 1955 because it was revoked in the ICC status order of that date affirming a Division 4 order to the same effect (R. 657). Obviously, ICC was terminating its 1945 order, in its superseding order to the same effect, in the belief and with the intention that there would be no hiatus with respect to Alleghany's continuing carrier status subject to ICC jurisdiction. Indeed, it expressly stated that its jurisdiction "is hereby retained." (R. 447). Actually, the court below in its final judgment enjoined, among other things, that part of the status order which terminated the ICC 1945 order. Therefore, if the reasoning that the court uses is correct, the 1945 order has been revived.*

It is clear from the very status order relied on by the District Court, and additionally clear from the ICC's contemporaneous decision in the Boston & Albany proceeding (R. 453-454), that the ICC did not have the slightest intention of terminating its jurisdiction over Alleghany. It reasserted jurisdiction over Alleghany simultaneously with its termination of the 1945 status order.

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*Long after the present appeal was taken the appellees made a motion, returnable December 6, 1956, asking the court below to amend its final judgment so as to provide specifically against revival of the 1945 ICC order. The court denied the motion, stating in an opinion dated December 7, 1956 (not yet reported) that it would stand by the language of its earlier opinion as reported in 138 F Supp. 123.

C. The District Court's Theory That Regulatory Control Can Automatically Shift from One Agency to Another, Contrary to the Orders of Both, Would Make Administrative Regulation Hopelessly Uncertain, Confused and Unworkable.

Orderly administration of governmental affairs makes it essential that administrative orders such as those of the ICC and SEC in this case be given effect in accordance with their terms until revoked or modified by regular administrative procedure. A system in which the regulated company was considered as shuttling back and forth, without voluntary participation of anyone, from one regulating agency to another, depending upon the factual situation at any given moment, would be unworkable both for the regulator and the regulated. On the one hand, the regulated company would never know with any certainty which regulating agency was in control and which set of regulations applied. Its own guess in the matter might turn out to be in complete disagreement with the view of the regulating agencies. It is neither fair to the regulated company to place upon it the burden, nor administratively sound to confer upon it the privilege, of deciding for itself which regulating agency has jurisdiction and when administrative orders are to be treated as revoked by circumstances so that they may be treated as nullities, in the face of provisions for revocation only by further order.

The integrity of the administrative process requires that the agency which issued an order shall determine whether the facts have sufficiently changed as to require its modification or revocation. A concept that some process of nullification by evaporation can be accepted would introduce administrative uncertainty where a definite rule of law is peculiarly important. It has always been recognized that, since "Government is a practical institution, adapted to the practical conduct of public affairs," administrative orders may and frequently must be made applicable to the in-

definite future, subject to modification by the agency when the facts justify. *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407, 416 (1921).*

The uncertainty and confusion which the District Court's position would produce is particularly apparent where regulatory status is determined by such variable, complex and controversial factors as corporate control.

This very case provides an apt illustration. Alleghany disposed of its C. & O. stock gradually, completing the disposition on January 19, 1954. (R. 399, 614). The question as to just which sale, if any, viewed in the light of all other pertinent circumstances bearing on control, takes a stockholder across the line from control to non-control, can be a highly debatable question. Probably nobody could accurately fix it. Certainly the corporation could not do so nor should investors be compelled to do so at their peril. It is the type of question which obviously must be left to affirmative determination by the regulating agency.

The question of "control" under the Interstate Commerce Act is one for decision under very technical and comprehensive definitions contained in §§ 1(3)(b), 5(4) and 5(5) of the Act. The difficulties and uncertainties involved are illustrated by the fact that in the very ICC proceeding here under consideration, after Alleghany had sold all its C. & O. stock, an intervenor whose pleadings were later adopted by appellees raised the issue as to whether Alleghany was nevertheless not still in control of C. & O. (R. 280). During Alleghany's proxy fight for control of New York Central, the then Central management also asked ICC to investigate whether Alleghany did not directly or indirectly control C. & O. despite the sale of its C. & O.

*A court, of course, has power to compel an administrative agency to consider a motion to modify an agency order which has allegedly been rendered inappropriate by changing conditions. *American Chain & Cable Co.* v. *FTC*, 142 F. 2d 909 (4th Cir. 1944).

stock, and ICC actually made such an investigation subsequent to the time appellees claimed there was an automatic termination of ICC jurisdiction over Alleghany (R. 420-421).

To require or permit the question of persistence of a Commission's regulatory jurisdiction to be decided by the regulated company itself would reduce administrative regulation to chaos. Even the court below, although holding that Alleghany automatically fell from under ICC jurisdiction at some time, was never able to delineate the time when the jurisdictional collapse occurred. In its first opinion it placed the date at January 19, 1954 when Alleghany completed selling its C. & O. stock (R. 614-615). Subsequently the court's attention was called to the fact that the 1945 ICC order involved not only C. & O. but another carrier (United States Trucking Company) controlled by Alleghany through Pittston Company, whose stock the 1945 ICC order required Alleghany to deposit with voting trustees (Unprinted Record, 2346-2347). Thereafter, in its second opinion, the court indicated at one point that Alleghany's automatic fall-out from ICC jurisdiction occurred either on January 19, 1954 or on May 21, 1954 when Alleghany ceased to control the Trucking Company (R. 656-657). In another part of the same opinion, the court said that the date of the fall-out was "at the very latest on May 24, 1955" when the ICC issued the status order continuing Alleghany in carrier status (R. 657). Still later, in a supplemental opinion, the court pointed out that its earlier statement as to Alleghany's control of the Trucking Company until May 21, 1954 had been challenged as misleading, and ruled that such earlier statement was not to constitute a finding of fact or conclusion of law (R. 680).

The practical difficulties which the court below itself found in applying a concept of revocation *sub silentio*, points up the undesirability of creating a rule which allowed

or required Alleghany to make that determination for itself and to disregard the orders of both SEC and ICC as automatically inoperative despite their expressly contrary provisions.

That no such *ex parte* inference of lapse was contemplated by the Interstate Commerce Act is made additionally clear by § 16(7) of the Act, which makes it the duty of a regulated carrier and its employees to comply with all ICC orders so long as they are in effect, and by § 10 which imposes criminal penalties for failure to comply with any requirement of the Act.*

D. Even if the 1945 Orders be Disregarded, Alleghany Was "Subject To" ICC Regulation and Therefore Not Within the Coverage of the Investment Company Act.

Even assuming that the 1945 orders somehow ceased at some indeterminate time to be operative, it would nevertheless be clear that Alleghany is not within the coverage of the Investment Company Act. The test § 3(c)(9) lays down is whether Alleghany is "*subject to* regulation under the Interstate Commerce Act." The Investment Company Act exemption does not depend on the nature or extent of the regulation actually imposed; it does not depend on whether a particular form of order under a particular sec-

*It would be small comfort to a company, faced with the necessity of deciding whether changed facts had rendered an ICC order inoperative, to realize that the criminal penalties apply only for willful violation. One of the three judges constituting the court below stated in an opinion in a related case that it was "patently frivolous" for Alleghany to rely on the ICC and SEC orders regarding Alleghany's regulatory status and impugned Alleghany's good faith in doing so—this despite the fact, stated above, that Alleghany's action was in complete accord with the actions and views of both ICC and SEC, and the fact that even the court below in this case never arrived at any definite conclusion as to just when the facts so changed as to render further compliance with the administrative orders unnecessary. *Brestwick & Co. v. Briggs*, 135 F. Supp. 397, 400 (S. D. N. Y. 1955). See also 65 Yale L. J. 543 (1956).

tion of the Interstate Commerce Act has been entered; it depends solely on whether Alleghany is "subject to regulation under the Interstate Commerce Act."

The court below recognizes that Alleghany was at least subject to the regulatory power exercised by the ICC in its Boston & Albany order of March 22, 1955 issued under § 5(2) of the Interstate Commerce Act (R. 675-678). Even without the other persuasive evidence of regulation, this established that Alleghany was "subject to regulation under the Interstate Commerce Act."

The court below held that the Boston & Albany order did not give Alleghany carrier status because it did not include an express statement to that effect pursuant to § 5(3); but as already stated, the Investment Company Act exemption does not depend upon the particular regulation or the particular section under which the ICC acts; it applies whenever the company concerned is "subject to" ICC regulation. The Boston & Albany order under § 5(2) was "regulation under the Interstate Commerce Act" and Alleghany was admittedly "subject to" that regulation even though the further step under § 5(3) was not taken.*

The emphasis placed by the District Court on the nature and form of the ICC's regulation of Alleghany is beside the point. If in any respect Alleghany failed to make the appropriate applications to the ICC, or the ICC's orders were defective in form, the result at most would be to bring into play the corrective procedures which are available under the Interstate Commerce Act, not to expel the ICC as the regulating agency and transfer Alleghany to Investment Company Act coverage.

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*Even if it were assumed that exemption of a company under § 3(c)(9) of the Investment Company Act requires ICC's subjecting the company to carrier status under § 5(3) of the Interstate Commerce Act, ICC did in fact declare in the Boston & Albany proceeding that Alleghany had been subjected to carrier status under § 5(3). It there in effect incorporated by reference its earlier (March 2, 1955) § 5(3) order, and pointed out that it had subjected Alleghany to carrier status in that order (R. 453).

The point can be illustrated by reference to the Securities Act of 1933, which contains an exemption provision (15 U. S. C. § 77c(a)(6)) similar to that of the Investment Company Act. Section 3(a)(6) of the Securities Act of 1933 exempts from registration securities which are *"subject to* the provisions of Section 20a of the Interstate Commerce Act." If a railroad company should issue securities without applying for ICC approval under § 20a, the securities would be void under the express provisions of § 20(a)(11) and the issuing company would be subject to the penalties imposed by the Act for violation of its provisions. It could not be argued, however, that the illegal securities would cease to be "subject to" § 20a and that they therefore would have to be registered under the Securities Act of 1933.*

The Boston & Albany order was actual ICC regulation, and the decision below does not challenge the validity of the order or the ICC's power to include Alleghany in its provisions. This, without more, establishes that Alleghany is "subject to regulation under the Interstate Commerce Act" and is therefore not an "investment company" as defined in the Investment Company Act.

The inconsistency with which the court viewed the Boston & Albany order in light of its background underlines the error of the court's view of the jurisdictional question. The court held that facts, not the actual terms of administrative orders reserving jurisdiction until modified, determine questions of regulatory status, and that despite the 1945 ICC and SEC orders to the contrary Alleghany was shifted from ICC to SEC jurisdiction by the fact of its disposition of C. & O. stock or by some other event never definitely specified. Yet when examining a new fact which concededly involved ICC jurisdiction, namely the newly-acquired acquisition of stock control of carriers by

*See in this connection Loss, Securities Regulation (1951 Ed.) 358-359.

Central and Alleghany in the Boston & Albany transaction, the court turned from fact to the form of order as the determinative criterion. That fact, it said, was not determinative because ICC omitted in the Boston & Albany proceeding to enter a specific § 5(3) order. Orderly administration precludes determination of vital questions of jurisdiction by reliance on such inconsistent criteria.

The error of the court below is pointed up by consideration of the reverse of the present case: suppose that Alleghany, ignoring the 1945 ICC and SEC orders, had proceeded to issue securities without seeking ICC approval and had sought to justify its conduct on the ground that factual changes had automatically vitiated the orders. It seems evident that the doctrine of the court below would not have been considered an adequate defense in proceedings to enforce one or both orders.

POINT III

ICC HAD POWER TO ISSUE THE CONTESTED ORDERS PURSUANT TO SECTION 5 OF THE INTERSTATE COMMERCE ACT BY VIRTUE OF THE BRIDGE COMPANY-BIG FOUR MERGER AND LEASE AND THE BOSTON & ALBANY ACQUISITIONS.

In Point II we have demonstrated that ICC had jurisdiction over Alleghany because Alleghany was subject to ICC regulation by virtue of the 1945 ICC and SEC orders. In Point III we now show that ICC power to issue the contested orders derived also from the Bridge Company merger and lease proceeding and the Boston & Albany acquisition proceeding, each of which independently involved a transaction by Alleghany within § 5(2) of the Interstate Commerce Act giving rise to ICC power over Alleghany.

The contested ICC status orders directing that Alleghany should continue to be considered a "carrier" subject to specified provisions of the Interstate Commerce Act

(R. 446-448, 516-517) were issued pursuant to § 5(3). Under that Section a non-carrier is to be "considered as a carrier" to the extent that ICC so directs when ICC authorizes the non-carrier to "acquire control" of carriers within § 5(2).

The ICC held here that the applications, in which Central and Alleghany joined, for ICC approval of the merger of the Bridge Company into the Big Four and the leasing of the Bridge Company properties from Big Four to Central, involved an "acquisition of control" within § 5(2) by Big Four and Central, and indirectly by Alleghany as the parent company (R. 514-515, 443). ICC accordingly continued Alleghany's carrier status pursuant to § 5(3) (R. 515, 447). ICC also later authorized the issuance of a new class of convertible preferred stock by Alleghany (R. 536-537, 554).

In so far as ICC's power to issue these contested status and stock orders is based on the Bridge Company merger and lease transaction, the validity of the orders turns on the question whether that transaction, as an intra-system rearrangement and tightening of control, constituted an "acquisition of control" by Alleghany within § 5(2).

In approving the Bridge Company transaction, the ICC rejected an argument that intra-system rearrangements are not covered by § 5(2), stating (R. 514):

> "Our jurisdiction under Section 5(2) of the Act over any rearrangement by Central of its ownership or control of its subsidiaries is well established. * * * failure to recognize that the public interest requires our approval of changes in the relationship of the carriers constituting the system would ignore the clear intent of the act as interpreted by our own and by court decisions."

The District Court disagreed with ICC's interpretation. It held that "where, as in the instant case, the non-carrier (Alleghany) is * * * already in indirect control of a carrier

(Bridge Company), and the merger still leaves the non-carrier in indirect control of such property, no acquisition by the non-carrier results from the merger" (R. 653-654). It was thus the court's opinion that an intra-system rearrangement of control does not fall within § 5(2). The court thought also that even though an intra-system *tightening* of control might be recognizable under § 5(2), no such tightening was present in the Bridge Company transaction.

The court recognized that newly-acquired control of carriers would subject Alleghany as well as Central to ICC jurisdiction. Nevertheless, when it came to deal with the Boston & Albany transaction involving acquisition of newly-acquired stock control of three carriers, it still refused to recognize Alleghany's carrier status because the provision of the earlier status order in the Bridge Company proceeding expressly subjecting Alleghany to carrier status was not repeated in ICC's Boston & Albany order (R. 676-677).

The court overturned ICC's interpretation of the statute not because of any decisional precedent requiring it; indeed, the decisions which bear on the question are the other way. The court reached its result solely because it believed its conclusion to be required by the language of § 5(2).

The court below likewise disagreed with another ICC ruling which bears upon ICC's power to issue the contested orders. ICC had held that Alleghany's 1954 acquisition of control of Central without ICC approval was entirely lawful, because Central and its subsidiaries had been recognized by ICC as a single integrated unit (*New York Central Unification,* 150 I. C. C. 278 (1929)), and its control by Alleghany therefore did not constitute a consolidation of carriers within § 5(2) (R. 511-512).

The District Court again differed with ICC's interpretation of the statute. It held that the Central System

must be regarded as more than one carrier for purposes of § 5(2), and that its acquisition by Alleghany should therefore have been submitted for ICC approval. This conclusion apparently assumed relevance for the District Court because of its assumption that ICC could not properly find that Alleghany controlled Central, as a necessary jurisdictional fact in the Bridge Company proceeding, unless Alleghany had applied for and obtained a specific ICC order approving that control* (R. 621). Here again the court rejected ICC's construction of the statute not because of any decision foreclosing its acceptance, but simply because the court took a different view of the statute.

We shall show in the following sections of this Point that the District Court's conclusions with respect to § 5 were wrong, and that ICC had power to issue the orders under review because (1) the Bridge Company transaction did fall within § 5, (2) ICC approval of Alleghany's control of Central was not a prerequisite to ICC power in the Bridge Company proceeding, and (3) the Boston & Albany transaction was independently a basis for ICC power to issue the orders.

A. The Bridge Company-Big Four Merger Was A Transaction Within Section 5(2).

The error of the District Court's conclusion that the intra-system rearrangement and tightening of control in

*The District Court's preliminary opinion held that the case would have to be remanded to ICC to determine whether Alleghany's control over Central was in the public interest. The second opinion held that even though in the Bridge Company proceeding ICC had specifically found that such control was a fact and that continued control "by Central and Alleghany" of Bridge Company and Big Four "will be consistent with the public interest" (R. 514-515), the court had to leave the findings out of account and not remand for further findings because Alleghany's application to ICC had not specifically requested approval of its control over Central (R. 670). This was a rather arbitrary treatment of the considered views of the agency charged with supervising the nation's transportation system.

the Bridge Company-Big Four merger and lease transaction did not constitute an "acquisition of control" within § 5(2) is demonstrated by an analysis of the statute itself, the decisions interpreting it, the practical consequences of the court's conclusion and the legislative history of the Section. A discussion of the legislative history is deferred until after the discussion of Alleghany's acquisition of control of Central since the legislative history demonstrates both that the Bridge Company transaction was within § 5(2) and that Alleghany's acquisition of control of Central was not.

The District Court's narrow view as to what constitutes an "acquisition of control" conflicts with the all-inclusive definition of the term "control" as used in § 5(2). "Control" as so used is defined in § 1(3)(b) of the Act as including:

> "* * * actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

§ 5(4) reinforces this definition by inclusion of a specific reference to "the power to exercise control or management." The Congressional intention that the term "control" as used in § 5(2) should be given the widest possible scope was emphasized by this Court in *United States* v. *Marshall Transport Co.*, 322 U. S. 31, 38 (1944) where the Court stated that the language embraced every type of control and that ICC's determinations with respect thereto, if warranted by the record, were conclusive. The all-inclusive statutory definition of "control," read with the

reinforcement given it by the Court's decision in the *Marshall Transport* case, does not permit of the restrictive reading of the term which lies at the foundation of the District Court's interpretation of § 5(2).

Analysis of the structure of § 5 also shows the fallacy of the District Court's interpretation. It was the court's view that an "acquisition of control," as used in the clauses of § 5(2)(a)(i) relating to acquisitions by *non-carriers*, occurs only upon acquisition of carriers not previously controlled by the acquiring non-carrier. The same "acquisition of control" language, however, is found in the clauses of the Section dealing with acquisitions by *carriers*, the third clause of § 5(2)(a)(i) permitting "any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise." When Congress used identical phrasing in successive clauses, one applicable to carriers and one applicable to non-carriers, it must have used the phrasing in the same sense in both cases. The District Court's interpretation would permit a carrier, completely free of ICC supervision, to participate in a variety of significant intra-system acquisitions of stock control with other carriers, despite the fact that the transactions had a significant impact upon the quality of the service of the carriers involved and upon the needs of the public.

For example, if the District Court were right, a carrier leasing lines of another carrier could lawfully, without approval or authorization by the ICC, buy 100% of the stock of the leased carrier. (But see *Union Belt Ry. of Oakland Control*, 271 I. C. C. 223 (1948)). Yet, the carrier could not without ICC approval acquire the properties of the leased carrier, because a purchase of carrier properties by another carrier is expressly covered by the carrier clauses § 5(2)(a)(i). To construe § 5 so as to create such hiatus and inconsistency in the scheme of regulatory supervision does not stand analysis.

That the District Court was wrong in its interpretation of what constitutes an "acquisition of control" by a non-

carrier is demonstrated by the settled authority that a rearrangement or tightening of control does constitute an "acquisition of control" by a carrier. This Court so held in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12 (1932), deciding that ICC had power to authorize Central's "acquisition of control" by lease of the properties of subsidiaries (Big Four and Michigan Central) which were already controlled by Central's ownership of their stock. The Court rejected the argument that since Central had already acquired control of the subsidiaries in question by means of stock ownership, there could be no further acquisition of control by lease, and held that if the public interest would be better served by the lease than by the stock ownership alone, "the statute affords no basis for the contention that the latter may not be authorized although the former exists." (287 U. S. at 23)

Although § 5(2) as it existed at the time of the *New York Central Securities* case was slightly different from its present form, the same question was presented to the Court there as here, namely, is there an "acquisition of control" within the meaning of the statute when the company to be "acquired" is already under the control of the acquiring company? Failure of the court below to look sufficiently at substance led it to disregard the plain implication of that decision, namely, that the ICC should address itself to whether or not a change of control affects the public interest and must therefore have been intended to be within the coverage of the statute. The decision should have been controlling here.*

If "acquisition of control" as used in § 5(2) has the narrow meaning attributed to it by the District Court, it

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*It should be noted that the transaction involved in the Bridge Company proceeding was similar to that involved in *New York Central Securities*, since it included a lease modifying the very lease involved in *New York Central Securities* (the lease by Big Four to Central) so as to include the Bridge Company properties under that lease.

would seem to follow, contrary to the *New York Central Securities* case, that there was no acquisition of control even by Central as a result of the Bridge Company-Big Four merger. Yet the District Court evidently recognized that there was an acquisition of control by Central since it expressly excluded from its injunction that part of the ICC order which approved and authorized control by Central of the Bridge Company properties (R. 555-556).

There is clearly an "acquisition of control" within the meaning of § 5(2) when a preexisting control is strengthened or tightened. Control is not an absolute which exists completely or not at all; it exists in varying degrees. Hence, a tightening of control is an acquisition of additional control. Even a change which might appear to be merely a change in the form of control may actually affect the degree of the power of the person in control and is therefore subject to ICC scrutiny.

In our view, concurred in below by both the Government and the ICC (R. 128), an acquisition of control in that sense occurred here. Alleghany's control of the hitherto separately operated Bridge Company was strengthened and made tighter because the Bridge Company, after its merger into the Big Four, ceased to exist and was forever foreclosed from operating as an independent unit. The merger brought the properties and franchises of the Bridge Company closer to Alleghany's control. As this Court pointed out in *United States* v. *Marshall Transport Co.*, 322 U. S. 31, 40 (1944), "there can be no more direct or positive manner of obtaining control than by outright purchase of another carrier's business and property." A combination of carriers through common stock control by a parent is a relatively impermanent and dissolvable combination; a combination of carriers through their merger by a common parent is a permanent combination.

The Bridge Company transactions likewise resulted in tighter control because Central for the first time became the

direct lessee of the properties and franchises of the Bridge Company (the identical situation which was held to constitute an acquisition of control within § 5(2) in the *New York Central Securities* case, *supra*, 287 U. S. 12 (1932). Through this supplementary lease Central acquired direct operating control of the leased properties and franchises, and Alleghany as the immediate parent of Central acquired tighter indirect control.

The practical consequences of the District Court's holding illustrate the difficulties to which it would give rise, and leave no doubt that such an interpretation could not have been intended by Congress. A few illustrations will suffice:

1. Approval by the ICC of a rearrangement of control of subsidiaries' properties may be essential to permit the ICC to relieve the parent under § 5(11) of restrictive state laws. If, as in the present case, ICC jurisdiction is limited to the merging subsidiaries and is denied with respect to the parent, the parent would not appear to be a carrier "participating in * * * any transaction" within § 5(11) so as to be eligible for relief against state laws. See *Seaboard Air Line Ry. Receivership*, 261 I. C. C. 689 (1946), and *Seaboard Air Line R. R.* v. *Daniel*, 333 U. S. 118 (1948).* In the present case, for example, it was necessary for ICC to grant relief to Central and Alleghany from certain restrictive statutory provisions of Kentucky, the state of incorporation of the Bridge Company (R. 438).

2. ICC has very wide powers to impose conditions upon its approvals under § 5, including the power to approve

*In *Texas* v. *United States*, 292 U. S. 522 (1934), this Court sustained a condition in ICC's § 5 approval of Kansas City Southern's leasing the properties of a Texas carrier, which condition relieved Kansas City Southern of compliance with Texas statutes requiring all carriers to maintain general offices within the state, prohibiting relocation of such offices or of machine shops, roundhouses, etc. ICC jurisdiction over a rearrangement of preexisting control may be imperative to relieve parents from liability under this type of state statute.

only if other carriers in the territory are included, the power to control financial aspects of an internal rearrangement, and the power to prescribe protection for labor. Full exercise of these powers can be had only if the parent of the subsidiaries undergoing rearrangements is itself before the ICC as an applicant. Moreover, an appropriate decision whether a proposed transaction under § 5 is in the public interest might be difficult or impossible in the absence of the non-carrier parent.

The necessity of subjecting a non-carrier parent to the jurisdiction of the ICC in order for the ICC to consider and approve an acquisition of carrier properties by the parent's subsidiary was made clear by this Court's decision in *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944). Although that case involved a purchase of assets from a carrier not previously under control of the purchaser, the decision has pertinence here. The Court there held that a non-carrier parent is a necessary party to a § 5 proceeding involving an acquisition by its carrier subsidiary. In so holding, the Court pointed out the importance in such a situation of subjecting the non-carrier parent to the jurisdiction of ICC, stating (322 U. S. at p. 41):

> "The control over the non-carrier contemplated by § 5(3) can be acquired only if the non-carrier subjects itself to the jurisdiction of the Commission by filing its application with the Commission for its approval of such non-carrier control as is provided by § 5(2)(b). The purpose of § 5(3) to subject a non-carrier, thus acquiring control, to specified provisions of the Act would be defeated if the non-carrier were not to become subject to the Commission's order. That is avoided by making it unlawful to acquire non-carrier control save on the non-carrier's application to the Commission in conformity to § 5(2)(b)."

The District Court's immunization in the present case of the non-carrier parent (Alleghany) from regulation by the

ICC in a proceeding in which its subsidiaries are participants is in direct conflict with the position taken by the Court in the *Marshall Transport* case.

The fact that Alleghany was not the immediate parent of the Bridge Company and the Big Four did not remove Alleghany from ICC jurisdiction in the proceeding for approval of their merger. For one thing, Alleghany was the immediate parent of Central, which was itself a party to the lease phase of the Bridge Company-Big Four transaction. Moreover, there is no basis in § 5(2) or in ICC or court decisions for drawing a distinction between immediate parents and remote parents for purposes of ICC jurisdiction. Indirect control by a second or third tier parent is as much within the definition of "control" contained in § 1(3)(b) as is control by an immediate parent. To hold otherwise would allow a parent to escape ICC jurisdiction by the simple device of injecting an additional corporate subsidiary into the hierarchy. The purpose of the statute, emphasized in the *Marshall Transport* case, to obtain ICC control over non-carriers whose subsidiaries engage in transactions within § 5(2) requires that remote parents be subjected to ICC jurisdiction to the same extent as immediate parents.

The ICC, whose interpretations of the Interstate Commerce Act are of course entitled to great weight, has repeatedly interpreted § 5(2) as encompassing an intra-system rearrangement or tightening of control by non-carrier parents as well as by carriers. Thus, in *Chesapeake & Ohio Ry. Co. Purchase*, 261 I. C. C. 239 (1945), ICC asserted jurisdiction over Alleghany in a proceeding substantially identical with the *Bridge Company* case, in which (1) C. & O. sought authorization to acquire the properties of its wholly-owned subsidiary, Norfolk Terminal & Transportation Company, and (2) Alleghany joined in the application as parent of C. & O. and sought approval to acquire

control of such properties indirectly through C. & O. ICC exercised jurisdiction and granted the applications. With respect to the application of § 5(2) to rearrangements of control, it stated (pp. 260-261):

> "The two applications contemplate a change of existing control, in that the Chesapeake & Ohio would control, through purchase, the properties of Terminal, instead of control through stock ownership and by lease, and Alleghany's control of the two companies would likewise be changed. Such 'internal rearrangement of corporate structure' must have our approval under section 5(2) of the act or be unlawful. *Warrior & Gulf Nav. Co. Control*, 250 I. C. C. 26, 28; *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473, 475, and *Atchison, T. & S. F. Ry. Co.—Control—Santa Fe Trail Transp.*, 15 M. C. C. 469, 471."

The same interpretation was enunciated by ICC in *Nicholas, Fayette & Greenbrier R. Co. Lease*, 261 I. C. C. 546 (1945). There, Central and C. & O., which jointly owned all the stock and leased all the properties of Nicholas, sought ICC approval under § 5(2) to expand the joint lease to include a recently constructed branch line of Nicholas. Alleghany joined in the application, but subsequently moved that its application be dismissed since it had just been subjected to carrier status in the *C. & O. Purchase* case, *supra*, 261 I. C. C. 239 (1945). ICC overruled the motion, stating (p. 548):

> "in *United States* v. *Marshall Transport Co.*, 322 U. S. 31, the Supreme Court of the United States held that where a carrier subsidiary of a noncarrier corporation proposed to us to acquire control of another carrier's property and business by purchase thereof, we were without authority to approve such control unless the proprietary company controlling the applicant made application to us also. The principle enunciated in that decision is equally applicable to a transaction involving control

by lease. Hence, we are forced to conclude that, although it is unnecessary to act again under section 5(3) in this proceeding, nevertheless the Alleghany is a necessary party to the instant application."

A few years later in *Pere Marquette Ry. Co. Merger*, 267 I. C. C. 207 (1947), ICC approved (1) merger of the properties of Pere Marquette into C. & O., and (2) acquisition by Alleghany of indirect control through C. & O. of the properties of Pere Marquette. This case also is substantially identical on the facts with the Bridge Company transaction, since C. & O. had previously held stock control of Pere Marquette. In addition to the acquisition of control over the Pere Marquette properties the ICC also approved acquisition of control by Alleghany through C & O. of Pere Marquette's interests in subsidiary and affiliated carriers including carrier properties leased by Lake Erie & Detroit River Ry., a wholly-owned subsidiary of Pere Marquette (267 I. C. C. at 212). In this respect the case constituted an acquisition of control by Alleghany in the capacity of a remote parent (C. & O. being the immediate parent in the transaction), contrary to the statement by the court below here (R. 664) that ICC has never found an intra-system rearrangement to be an acquisition of control by a remote parent.

We shall not extend this brief by a case-by-case rebuttal of the District Court's erroneous view (R. 664-669) that ICC has not consistently held every intra-system rearrangement to be an acquisition of control. For one thing, whatever the degree of consistency in ICC's decisions, so long as its interpretation in the present proceeding had rational basis it was entitled to be upheld. *Georgia Public Service Commission* v. *United States*, 283 U. S. 765 (1931). Moreover, since 1920 ICC does not seem to have deviated from its construction of § 5(2) as requiring its approval of intra-system rearrangements of control. For at least the past

ten years, following this Court's 1944 decision in the *Marshall Transport* case and ICC's decision shortly thereafter in the *C. & O. Purchase* case, ICC has repeatedly required holding company parents of carriers to join in any application for internal rearrangements of the controlled system.* This consistent pattern of administrative interpretation is entitled to great weight on hornbook principles repeatedly applied by this Court.

B. ICC Correctly Held That Its Approval of Alleghany's Control of Central Was Unnecessary.

Alleghany has not asserted in this case that its carrier status under § 5(3) was attributable to any ICC order authorizing it to control Central, for there was none and none was necessary. Nevertheless the District Court concerned itself with the question of necessity of such an ICC order on the theory that without it the actuality of control of Central could not be accepted as a jurisdictional factor in the Bridge Company proceeding.** In so doing the court fell into two errors: (1) it misread § 5(2) in assuming that it could not recognize the actuality of control in the absence of an ICC order authorizing the control, and (2) it compounded the error by making the further incorrect assumption that Alleghany's control of Central required

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*In a few motor carrier cases where the parent was an individual or a personal holding company, ICC has permitted the particular facts to determine whether the parent should be considered as a carrier. *Pratt's Express Co.—Purchase—Security Warehouse Company*, 39 M. C. C. 834 (1944); *Standard Freight Lines, Inc.—Merger*, 40 M. C. C. 41 (1945); *Consolidated Truck Lines—Control and Merger*, 57 M. C. C. 277 (1951); *Commercial Petroleum & Transport Co.—Control*, 58 M. C. C. 439 (1952).

**Alleghany's control of Central was a jurisdictional factor in the Bridge Company proceeding, since Alleghany's indirect acquisition of Bridge Company properties would not have come within § 5(2) unless Alleghany was a non-carrier already in control of a carrier, i. e., Central.

ICC approval. These two errors will be discussed briefly and separately.

(1) Section 5(2) was satisfied here by ICC's finding (R. 417, 435, 511-512, 513) that Alleghany was in control of Central. That was the important consideration, not ICC approval. This is clear from the language of § 5(2)(a)(i), which permits, with ICC approval, a non-carrier "which has control" of one or more carriers to acquire control of another carrier. The statute does not refer to "control acquired with the approval of the ICC"; what it requires is ICC approval of an acquisition of a carrier where there is already factual control of one or more carriers.* The clear objective of the statute is to subject to ICC regulation all situations involving actual control of carriers. Adoption of the District Court's theory that the actuality of control cannot be recognized in the absence of ICC approval of the control would severely limit the scope and regulatory effectiveness of the statute.

Thus, the finding made by ICC that Alleghany is in control of Central was all that was here required to bring Alleghany's acquisition of control in the Bridge Company proceeding within the terms of § 5(2). As was pointed out by the Government and by the ICC in their brief below (R. 129):

> "If the control [Alleghany control of Central] had been illegally acquired, there were available remedies to cover that situation, but the fact that it had been illegally acquired would not prohibit the Commission from acting on the merger application.

*Suppose Alleghany had simultaneously acquired both New York Central and the New Haven Railroad without obtaining ICC approval. Could anyone possibly contend that if Alleghany later applied for authority to acquire a third carrier the ICC would be without jurisdiction because its required approval of the earlier acquisition had not been sought or given?

> In that application the Commission was solely interested in the actuality of the control by Alleghany of Central and not whether that control had been legally or illegally acquired."*

(2) The decision below was wrong not only because the relevant jurisdictional consideration is the actuality of control, but for the additional reason that Alleghany's ouster of the old Central management was not, as the District Court thought, a transaction requiring ICC approval under § 5(2) of the Interstate Commerce Act. Section 5(2) nowhere requires ICC authorization and approval of the acquisition of control of a single carrier by a non-carrier.

The legislative history of § 5 (discussed below) confirms the clear intention of Congress to deal in that Section solely with combinations of railroads and railroad properties, and not to serve the unrelated function of screening the qualifications of carrier managements where no such combination results.

A non-carrier comes within the section only when it acquires control of two or more carriers, or when it is already in control of one carrier and acquires another. No reason has been suggested why a different result should obtain, and ICC approval be required, if the carrier whose control is transferred happens to have a carrier subsidiary. In neither situation is any consolidation of carriers affecting the public interest in transportation effectuated.

If Congress had deemed it desirable to require that the ICC be given so far-reaching a power as to pass on the

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*ICC ruled to the same effect in the *C. & O. Purchase* case, *supra*, 261 I. C. C. 239, 261 (1945), where it held that whether or not Alleghany's theretofore unapproved control of C. & O. required ICC approval, ICC could take jurisdiction of applications by Alleghany and C. & O. under § 5(2) for approval of acquisition by C. & O. and Alleghany of control of another carrier.

qualifications of anyone who wished to acquire a railroad property, it would certainly have been explicit in saying so and would have provided ICC with standards for the exercise of the power. Acceptance of the District Court's view that success in a proxy contest for control of an integrated rail carrier requires ICC approval would be a death blow to corporate democracy. As a practical matter it would destroy the right of a stockholder to challenge management by a proxy contest. All existing railroad managements would be unassailably entrenched. Incumbent managements would naturally seek, as the old Central management did in this very situation, to prevent the ICC's approval of shift in control. Single carriers by the simple device of creating a subsidiary carrier could put themselves within the framework of § 5(2) and thereby defeat attempts to challenge the management.

In recent years railroad managements have been ousted in proxy contests in the Central, the New Haven and the Minneapolis & St. Louis systems. If ICC approval had been required it is likely that none of these could have occurred. A proxy contest never begins, and cannot begin, earlier than a few months before the annual meeting of stockholders. Resort to ICC approval procedure would require many times that long. The possibilities for delay inherent in the statutory requirement in § 5(2) of notice to the Governors of all states in which the affected carrier operates and opportunity for all interested parties to be heard, in protracted hearings before Divisions of the ICC, in reconsideration by the full Commission, in review by three-judge courts and in appeals to this Court are such that stockholders' meetings would come and go before proceedings to approve the transfer of control could be completed. The crucial element of timing in proxy fights would be lost, and with it even a remote hope of successfully challenging existing managements.

The result would be the practical elimination of the proxy contest in railroad corporate life. Only the clearest of Congressional declarations could warrant such a far-reaching interpretation of § 5(2).

Neither the court below nor anyone else claims that ICC approval is required if only a single carrier is acquired. The only question here raised is whether a carrier having a carrier subsidiary is to be treated as more than one. If the statute were to be interpreted as requiring ICC approval whenever a non-carrier acquires a carrier with a carrier subsidiary, the strange result would be that ICC approval would not be needed for acquisition of a giant railroad carrier having no carrier subsidiary, but would be needed for acquisition of any carrier, no matter how small, which has such a subsidiary.

The structure of § 5 refutes any notion that it empowers ICC to pass upon the qualifications of a person who acquires control of an integrated carrier system. Section 5 as it existed between 1933 and 1940 required that the ICC find, as a prerequisite to its approvals under the Section, that the transactions in question were "in harmony with and in furtherance of" the ICC master consolidation plan required under the then existing statute. Obviously if § 5 were a "qualifications" statute, a simple transfer of control—lacking any element of unification—would be meaningless with respect to the master consolidation plan.

Section 5 today enumerates certain other factors which ICC must consider in its consideration of a § 5(2) transaction. For example, ICC must provide certain protection for employees (§ 5(2)(f)); it must also consider the effect of the failure to include other railroads in the transaction, and require their inclusion when in the public interest (§ 5(2)(d)). These factors are of crucial significance in the case of consolidations of railroad properties but of no significance where a simple transfer of ownership control

takes place. If the court below were right that the transfer of control of Central to Alleghany came within § 5(2) the consequence under § 5(2)(f) would be that Central's employees would automatically become entitled to job protection for four years merely because the Company had a new controlling stockholder. The mandatory provision for employee protection has relevance where a combination of carriers occurs, with the prospect of elimination of duplication and consequent loss of jobs. It has no relevance, however, in the case of a mere transfer of ownership control. The incongruity of applying such provisions to a simple transfer of control is a further indication that such transfers of control were not the concern of the statute.

ICC has never required applications for approval under § 5 of the acquisition of control of an integrated railroad carrier system where the acquiring party did not then have control of another carrier.* As ICC pointed out in this case (R. 514):

> "We do not deem it inconsistent with our lack of jurisdiction over acquisition of control over the established system, that Alleghany be considered a necessary party in proceedings for rearrangement of control. The first is a transaction in which it appears from the provisions of the act that no public

*Cases pointed to by the District Court as involving ICC approvals of transfer of control of integrated rail systems do not support the court's position. *Seaboard Air Line Ry. Co. Receivership*, 261 I. C. C. 689 (1946) involved ICC approval of an acquisition of control of railroad properties in substantially rearranged and consolidated form, involving the elimination of one carrier. *Arkansas & L. M. Ry. Co. Control*, 282 I. C. C. 254 (1952), involved ICC approval of the purchase of control of four rail carriers, two from one corporation and two from subsidiaries of that corporation. The purchase brought the carriers into realignment and involved an element of unification. *Weinstein-Control-Capital Transit Co. & Montgomery*, 56 M. C. C. 127 (1949) involved motor carriers, the operating authorizations for which are transferable under § 212(b) of the Motor Carrier Act only with ICC approval (49 U. S. C. § 312(b)).

> interest is involved. But failure to recognize that the public interest requires our approval of changes in the relationship of the carriers constituting the system would ignore the clear intent of the act as interpreted by our own and by court decisions."

ICC's consistent interpretation of § 5 in this respect should not have been disregarded as it was below.

C. Legislative History Establishes That the Bridge Company Merger was a Transaction Within Section 5 and That Alleghany's Acquisition of Control of Central Was Not.

The error in the District Court's interpretation of § 5 stems in part from its undertaking to interpret a statute of broad dimensions, and rooted in history, without regard for the light shed by its legislative history on the Congressional intent. Section 5 resolved important issues of domestic policy, and cannot be interpreted in a vacuum.*

The legislative history of § 5** discloses a Congressional intent to subject to ICC approval all combinations and consolidations of carriers and of carrier properties, without regard to whether they are or are not already within the same system. It discloses also an emphatic rejection of the notion that ICC approval is required for acquisitions of control where there is no resulting combination of carriers or carrier properties.

Section 5 as first passed in 1887 simply forbade the pooling of traffic and revenues by railroads (now § 5(1)).

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*This Court has emphasized, with specific reference to the Interstate Commerce Act, the undesirability of attempting to determine the meaning of a statute by examining mere words isolated from their context and from the history of their origin. *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 542 (1940); *McLean Trucking Co. v. United States*, 321 U. S. 67, 80 (1944).

**The history of § 5 is summarized in this Court's opinions in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U. S. 298 (1954), and *Railway Labor Executives' Ass'n. v. United States*, 339 U. S. 142 (1950).

Until 1920, the degree of permissible railroad unification was left to be measured by the Sherman Act. The Transportation Act of 1920 marked a sharp Congressional shift in its policy of dealing with railroad combinations. Section 5(2) of the 1920 Act authorized ICC to approve the acquisition of control of one carrier by another carrier by lease, purchase of stock, or any other manner not involving consolidation, where ICC found such acquisition to be in the public interest.

Experience soon demonstrated that § 5, in its post-1920 form, was seriously defective. In granting ICC power under § 5(2) to authorize acquisitions of control only by one carrier of another, the Act failed to cover the acquisition of control of two or more carriers by a non-carrier, or the acquisition of control of one carrier by a non-carrier already having control of a carrier. Furthermore, ICC was given no jurisdiction over the non-carrier which acquired such control.

Against this background, Commissioner Eastman, Dr. Walter Splawn (special counsel to the House Interstate and Foreign Commerce Committee), and Chairman Rayburn of that Committee, drafted what for present purposes is the statute as it exists today. It was enacted as the Emergency Railroad Transportation Act of 1933.*

Dr. Splawn's interpretation of what are now §§ 5(2) and 5(3) is authoritative, not alone because he was a co-drafter of the measure and special counsel to the Congressional committee which studied the problems the measure was designed to meet, but also because the House Report (H. Rept. 193, 73d Cong., 1st sess., p. 15 (1933)) specifically referred to the testimony of Dr. Splawn as providing a full explanation of the measure. Dr. Splawn explained the bill as follows:

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*Since 1933 there have been amendments of importance to §§ 5(2) and 5(3), but none of relevance to the present inquiry.

> "The new provisions have to do with bringing the railroad holding company, *in so far as its activities affecting consolidation are concerned*, within the jurisdiction of the commission. That language, at first, looks a little complicated, but when you study it I think you will agree, as we have all agreed, that it is rather simple and goes directly to *the object, that is, bringing the holding companies under the jurisdiction of the commission, for what purpose? Merely in so far as their activities affect the consolidations of railroads.*" (Hearings on H. R. 9059, Comm. on Interstate and Foreign Commerce, 72d Cong., 1st sess., p. 19)

Commissioner Eastman, chairman of the legislative committee of ICC, testified to the same effect. In response to a question from a Congressman as to whether the measure outlawed a "stock pool" or "voting trust" in a railroad stock, Commissioner Eastman stated:

> "It prohibits them only in so far as they result in accomplishing or effectuating control or management of two or more railroads in a common interest. It should be borne in mind that the bill deals only with the matter of combining or uniting railroad companies *or properties*. (Id. at p. 61)

He further stated:

> ". . . the intention of the bill is to put under the jurisdiction of the commission the *combining of railroad properties through the medium of a holding company*. It also provides that if such a combination through a holding company is permitted, then that holding company shall come under the jurisdiction of the commission * * *" (Id. at p. 255)

Subsequent legislative history of the Splawn-Eastman-Rayburn measure confirms the essential correctness of these views. Thus the House Report (H. Rept. 193, 73d Cong., 1st sess. (1933)) explained the origin of the "holding company bill" as quoted above, referred to Dr. Splawn's testi-

mony for a detailed explanation of the measure, and gave as its purpose "to prevent through the use of holding companies and other devices the defeat of the congressional will" which was "to place the unification of *the railway properties* of the United States *entirely* within the control of the commission" (p. 20). The Senate Report (S. Rept. No. 87, 73d Cong., 1st sess. (1933)) similarly spoke of the intent of the bill "to authorize *every* form of unification *of railroad properties* which may conceivably be in the public interest, and to bring *all* such forms, including holding companies, under the complete supervision of the Commission" (p. 9).

These few examples of the Congressional intent can be multiplied many fold. Even this brief review, however, refutes the interpretation which the District Court placed on § 5. It demonstrates that the court misconceived the statute when it held that Alleghany's election of its slate of directors to Central's board required ICC approval. It demonstrates equally that the court misconceived the statute when it held that a merger of Central subsidiaries, involving the complete extinguishment of the existence of one carrier and the combination of its properties with those of another carrier, did not require ICC approval insofar as the holding company's participation is concerned. The clear Congressional intention, reiterated in the legislative history, was to subject holding companies to ICC control fully whenever their activities relate to or involve consolidation of railroad companies or of railroad properties, but in no other case.

Two further elements in the legislative history of § 5 are of importance to the problem before the Court:

(1) In determining whether Congress intended the "acquisition of control" language of § 5(2) to apply to intra-system rearrangements of control, an important if not a controlling factor is the administrative interpretation of similar language in the prior act and the Congressional knowledge of that interpretation. As previously

stated, the Transportation Act of 1920 (41 Stat. 481) empowered ICC to authorize the "acquisition * * * of the control" of one carrier by another by lease, stock purchase or any other manner not involving consolidation. When Congress used the terminology of "to acquire control" in § 5(2) as enacted in its present form in 1933, it must be taken to have used it in the light of its interpretation in the prior statute by ICC in the period between 1920 and 1933.

On scores of occasions during that period ICC had held that an "acquisition of control" was involved when a parent company altered its control over a previously controlled carrier subsidiary. To illustrate by a case close to home, in *Control of Big Four by New York Central*, 72 I. C. C. 96 (1922), ICC authorized Central, then owning 64% of Big Four's common stock and 53% of all its stock, to "acquire control" of Big Four by purchasing further stock.

The scope and consistency of ICC's interpretation is apparent from a study undertaken by the Senate Interstate Commerce Committee, pursuant to Senate Resolution 290, 71st Congress, to see how the bringing together of railroad properties was progressing. The Preliminary Report of a Study of Railroad Consolidations and Unifications, issued by the Senate Committee, reported (p. 22):

> "Of 347 acquisitions of control [approved by ICC under § 5(2)] between March 1, 1920 and October 31, 1930, 217 were not new acquisitions—being leases of subsidiaries, reorganizations, further control, etc."

A further breakdown in the report indicated there were 110 instances of ICC approval of "leases of subsidiaries or of subsidiaries of other members of same system, subsidiary relationship existing prior to lease." There were 39 instances of "acquisitions of control of carriers * * * which were subsidiaries or members of the system of the acquiring carrier prior to acquisition or which were constructed during the year of acquisition."

The fact that ICC was interpreting § 5(2) in the period before 1933 as encompassing alterations in the form of control over previously controlled carriers was brought home to Congress not only through the ICC decisions themselves, but also through ICC's annual reports to Congress. Those reports in addition to tabulating the § 5 cases handled and the parties involved, reported repeatedly that ICC was asserting jurisdiction over alterations in control. For example, ICC reported, "The New York Central Railroad Co., the Pennsylvania Railroad Co., the Atchison, Topeka & Santa Fe Railway Co., and others, have utilized the controls effected to consolidate the operations of the lines of subsidiary companies with those of the parent companies." ICC Fortieth Annual Report, p. 18 (1926). Similarly, ICC reported that the "Pennsylvania Railroad Co. was authorized to lease the railroads of * * * two of its subsidiary companies." ICC Forty-fourth Annual Report, pp. 3-4 (1930).

The enactment by Congress in 1933 of the "acquisition of control" language contained in the former statute, with knowledge of the prior administrative interpretation of the language, should be regarded as a legislative adoption of the administrative interpretation. *ICC* v. *Parker*, 326 U. S. 60, 65 (1945); *NLRB* v. *Gullett Gin Co.*, 340 U. S. 361 (1951); *Signal Oil & Gas Co.* v. *FPC*, (3d Cir. Nov. 20, 1956).

(2) Paragraph (6) of the bill which culminated in the 1933 amendment to § 5 took cognizance of the fact that during the 'twenties holding companies might have acquired control of a number of different carriers without ICC approval which was not then required. Paragraph (6), therefore, proposed to empower ICC to require divestiture of carrier stocks (acquired after the Transportation Act of 1920 without ICC approval) if ICC found that such stock holdings were likely to hinder its master consolidation plan.

This feature of the bill came under heavy attack on the ground that it came perilously close to empowering ICC "to say who shall be the stockholders of the railroads in the United States." (Hearings on H. R. 9059, p. 75). Congressman (formerly Solicitor General) Beck of the House Committee complained to Commissioner Eastman that

> "It is, of course, the broadest claim of power of which I have any knowledge, because its implications are infinite, and it portends something, in my judgment, because it constitutes your commission of 11 men, as I have said, the judge as to who shall be the stockholders. If it applies to holding companies, it should equally apply to individuals."

Congressman Beck was assured by Commissioner Eastman that there was no such intent (Id. at p. 79). The written views of Dr. Splawn squarely met the issue. He said (Id. at p. 281):

> "There has been much confusion introduced into the discussion of this paragraph [paragraph (6)] by reason of failure to recognize how closely it is related to the consolidation plan. It has been contended that the bill should be called 'a bill to regulate the ownership in stock of railroads', implying that it contains provisions for arbitrary regulation of stock ownership, and ignoring the fact that the respect in which stock ownership in railroads is sought to be controlled is exceedingly narrow and closely tied up with the basic purpose of preventing the defeat of the consolidation plan. * * *
>
> "These arguments have no application to the bill, because it contains no such sweeping and arbitrary provisions. Therefore, much if not all their force is lost. Actually, the bill provides for divestment only in cases where the holding of stock is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of the consolidation plan or impairing the independence of the systems provided for in such plan, by reason of subjecting one carrier to the control, domination, or influence of another carrier."

This aspect of the legislative history discloses an emphatic Congressional rejection of the notion that it should, or even could, subject to ICC approval acquisition of a controlling stock ownership in a railroad, *per se*. It was not undertaking to empower ICC to say "who shall own the railroads;" it was not undertaking to outlaw corporate democracy in the United States; it was acting to foster and protect orderly railroad unification under ICC auspices.

D. ICC Had Power to Issue the Preferred Stock Order by Virtue of the Boston & Albany Acquisition Which It Approved.

Even under the District Court's view that where there is pre-existing stock control of a carrier there can be no further "acquisition of control" within § 5(2) through the merger or lease of its properties, ICC's approval of newly-acquired stock control of three carriers by Central and Alleghany in *Boston & Albany Railroad Co. Control* (R. 450-473) was unquestionably a transaction within § 5(2). ICC's approval of this transaction was granted on March 22, 1955, before ICC's final status order in the Bridge Company proceeding and before ICC's preferred stock order, and it therefore supports ICC power to issue the preferred stock order.

In the Boston & Albany proceeding, Central and Alleghany applied for and were granted authority to acquire control of Boston & Albany Railroad Company and two other railroads through acquisition of their stock by Central. Neither Central nor Alleghany had previously owned any stock in two of these carriers and only 16% (through Central) of the stock of the third (R. 454). The transaction was thus within the scope of § 5(2) even under the restrictive interpretation of the court below, since it was an acquisition of stock control of carriers which the acquiring companies had not previously held. Such an acquisition of stock control of carriers is expressly within the language

of § 5(2), which includes a non-carrier's acquisition of control of carriers "through ownership of their stock." Moreover, there is no claim of any procedural defects in connection with the Boston & Albany proceeding such as were found by the court below in the Bridge Company proceeding.

The court below refused to accord any relevance to the Boston & Albany proceeding on the ground that although ICC had there approved a transaction clearly within § 5(2), ICC had not taken the further step of formally directing that Alleghany should be considered as a carrier under § 5(3). The court recognized that the cause of that omission "may perhaps have been the belief of the ICC that there was a valid order outstanding to that effect in the proceeding here under review" (R. 676). Such an order had been made by the ICC only twenty days previously in the Bridge Company proceeding (R. 446-448). Indeed, in its Boston & Albany report ICC expressly incorporated a reference to its earlier order in the Bridge Company case as well as to the fact that it had declared Alleghany to have carrier status in that earlier order (R. 453-454).* Nevertheless, the District Court held that ICC's omission to make a redundant order declaring Alleghany's carrier status all over again in the Boston & Albany proceeding resulted in loss of carrier status.

The court below erred in these efforts to find that Alleghany was outside ICC jurisdiction. The court first held that the ICC order specifically declaring Alleghany's

*The ICC has followed the practice of not cumulatively conferring § 5(3) carrier status on a non-carrier which it has already recognized as having such status. Thus, in *Nicholas, Fayette & Greenbrier R. Co. Lease, supra*, 261 I. C. C. 546, 548 (1945), ICC stated as to Alleghany that "it is unnecessary to act again under section 5(3) in this proceeding" because it had earlier in the same year recognized Alleghany's carrier status in the *C. & O. Purchase* case, 261 I. C. C. 239 (1945).

carrier status in the precise words of § 5(3) in the Bridge Company proceeding was invalid because the merger of the two rail carriers there involved did not fall within § 5(2). Then, when faced with a transaction which undeniably did fall within § 5(2), the court again denied ICC regulation of Alleghany, this time because of ICC's omission to include in its order a repetition of the declaration of carrier status already made three weeks earlier. All this was in the face of the fact that ICC's omission was obviously attributable to lack of knowledge that the District Court six months later would invalidate ICC's earlier order. In its treatment of the Boston & Albany proceeding the court below erroneously sacrificed substance to form.

POINT IV

THE ICC PROCEEDINGS WERE FREE FROM PROCEDURAL DEFECTS.

A. Appellees were not Entitled to any Hearing Beyond that Accorded them by the ICC.

Although appellees complain about lack of an adequate hearing in both the status order dockets and the preferred stock order dockets, the court below dealt only with the status order dockets and made no holding that appellees were entitled to any hearing in the preferred stock order dockets. In this respect the preferred stock order docket was of course governed by § 20a(6) of the Interstate Commerce Act, which provides:

> "The commission may hold hearings, *if it sees fit,* to enable it to determine its decision upon the application for authority."

The fact is, however, that the appellees were given full opportunity to, and did, present their position and views on both the status and preferred stock orders to the ICC in voluminous pleadings, affidavits and briefs (R. 269-281, 317-324, 392-410, 448-449, 478-480, 489-492, 537-544).

The court below erred in holding that the ICC violated the Interstate Commerce Act by failure to accord appellees an additional hearing which it described as an "evidentiary hearing." ICC is required to make certain formal findings in approving an application under § 5, but it may do so either on the basis of the sworn application before it or, in its discretion, on the basis of a hearing.* The applicable provision (§ 5(2)(b)) is as follows:

> "Whenever a transaction is proposed under subparagraph (a) of this section, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a *public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest.*"

Under this provision ICC's discretionary power to dispense with a hearing is beyond dispute.

The District Court apparently recognized the propriety of ICC's determination that no "public hearing" was neces-

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*ICC's power to determine the necessity of a hearing and to grant applications on the basis of a sworn application without hearing is not unusual. See § 309 of the Communications Act (47 U. S. C. § 309). See also SEC's Rule U-23 of the General Rules and Regulations under the Public Utility Holding Company Act of 1935 (15 U. S. C. § 79).

sary.* However, the court pointed to certain language in § 17(3) ("All hearings before the Commission * * * shall be public upon the request of any party interested") and in § 5(2)(b) ("the Commission * * * shall afford reasonable opportunity for interested parties to be heard") and drew the deduction that § 5(2)(b) recognized both a "public hearing", which ICC had power to omit as unnecessary, and a "non-public hearing" at which interested parties must have a reasonable opportunity to be heard (R. 671). Or, as the court's first opinion phrased it, the "public hearing" which ICC could dispense with "is something quite different from merely hearing the interested parties" (R. 627).

This conclusion is squarely in the teeth of the statutory language. Section 5(2)(b) thrice refers to and recognizes only a "public hearing," and is its own true measure as to what type of hearing it contemplates and whether ICC may dispense with a hearing. Section 17(3), in merely stating that interested parties may require hearings to be public, has no relevance and does not qualify as a guide to the construction of § 5(2)(b). This language of § 17(3) can have no application to another section of the Act which by its terms permits no other than "public hearings."**

The view that § 17(3) operates to bifurcate § 5 hearings into "public hearings" (which ICC may omit) and "non-public hearings" (which ICC may not omit) would lead to a strange contradiction. If it be true that appellees in

*ICC's Division 4 concluded, in the precise words of the statute, that it was "of the opinion that a public hearing is not necessary in the public interest" (R. 416). The full Commission determined that, since the appellees were primarily concerned with problems of statutory interpretation, "it is our opinion that there is no need to order a hearing" (R. 508).

**The court sought to buttress its view that a hearing was mandatory by reference to certain of ICC's General Rules of Practice (R. 670-671). The rules referred to are concerned with the mechanics to be followed where a hearing has been ordered, and have no relevance to the problem whether ICC has discretion to order or forego a hearing on a § 5 application.

some way derive from § 17(3) the right to force a "non-public hearing" under § 5(2)(b) what becomes of the right of other parties under § 17(3) to insist that all hearings be public? The Section, although it provides that interested parties may require all hearings to be public, would actually prove under the District Court's theory to be the means whereby a non-public hearing could be forced. It would thus be solely responsible for defeating the only right it sets forth.*

Congressional purpose in devising the present language of § 5(2)(b) will not permit a view that two types of hearings were contemplated—i.e., a discretionary "public hearing" and a mandatory "non-public hearing," consisting of "merely" hearing interested parties or affording them a "reasonable opportunity * * * to be heard." Before 1949, the quoted language of § 5(2)(b) concluded with the statement that "a public hearing shall be held in all cases where carriers by railroad are involved." ICC found burdensome the mandatory requirement for a hearing in all railroad proceedings, irrespective of the nature of the case and the issues. It several times requested Congress to remove the requirement. (See, e.g., ICC's 61st Annual Report to Congress, p. 147 (1947); Commissioner Splawn's testimony before the House Interstate and Foreign Commerce Committee on H. R. 5623, 80th Cong., 2d sess., pp. 6-14; and his testimony on H. R. 1710, 81st Cong., 1st sess., pp. 17-19).

Congress responded by passage of the Act of August 2, 1949 (63 Stat. 486) which added to the language requiring a hearing in railroad cases the clause "unless the Commission determines that a public hearing is not necessary in

*It leads nowhere to say that Alleghany, confronted with appellees' demand for a mandatory non-public hearing, could invoke § 17(3) and require the hearing to be "public." If the hearing be a "public hearing," ICC may dispense with it. The District Court's theory must write out of the statute either ICC's power to dispense with a public hearing or an interested party's power to insist that a hearing be public.

the public interest".* The sole purpose of this amendment was to grant ICC the discretion to dispense with a hearing in railroad cases that it already had with respect to motor carrier cases. Cf. *O. C. Wiley & Sons* v. *United States*, 85 F. Supp. 542, 545 (W. D. Va. 1949), aff'd, 338 U. S. 902 (1949). There is not a shred of support for a view that Congress was lifting the mandatory requirement of a "public hearing" but recognizing and continuing an inflexible requirement for a "non-public hearing where demanded." Indeed, prior to the District Court's decision, we are unaware that anyone, before Congress, the Commission, or elsewhere, has ever suggested the possibility that there are two types of hearings under § 5(2)(b)—a "public" hearing and a "mere" hearing (R. 627).

Nor does the District Court's conclusion find support in either the "reasonable opportunity to be heard" phrase in § 5(2)(b) or in the case of *FCC* v. *WJR The Goodwill Station*, 337 U. S. 265 (1949) from which the court below seemed to infer that the failure to grant a hearing ight be a violation of due process of law. One has had a reasonable opportunity to be heard under § 5 where he has received proper notification of a pending proceeding before the ICC whether or not such proceeding takes the form of a hearing.** *Quinn Freight Lines, Inc.—Purchase,—*

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*The same thing occurred as to motor carriers. The Motor Carrier Act of 1935 (49 Stat. 555) included a separate section (§ 213(a)) on motor carrier consolidations and required a hearing in all cases. On ICC complaint that this inflexible requirement was burdensome, Congress passed the Act of June 29, 1938 (52 Stat. 1239) which approximated the present language of § 5 in granting ICC discretionary authority to hold a hearing in motor carrier consolidations. The Transportation Act of 1940, combining into § 5 the previously separate consolidation sections applicable to rail and motor carriers, carried forward the law as it then stood: —i.e., hearings were discretionary in motor carrier cases, mandatory in rail carrier cases.

**There is no such issue in this case. Appellees had notice of the proceeding and full opportunity to present their views and request a public hearing. ICC permitted their intervention and fully considered their contentions (R. 269-281, 317-324, 392-410, 448-449,

Marshall, 55 M. C. C. 767, 777 (1949), 57 M. C. C. 567, 579 (1951); *Pelletier Trucking Co.—Purchase—Saw Mill Supply, Inc.*, 57 M. C. C. 115, 121 (1950). The *WJR* case, in contrast to the narrowness of its holding as interpreted by the District Court, reaffirmed in the broadest language that adequacy of hearing has never been a term of fixed and invariable content.

Finally, there is a contradiction between the District Court's view that ICC improperly denied appellees an evidentiary but non-public hearing in the status proceeding and its virtual concession that the status order as such was not reviewable. The court conceded that "plaintiffs perhaps suffered no injury" from the status order and therefore "the status order, by itself, may not have been reviewable" but only became so by reason of the ICC's later preferred stock order (R. 661). Appellees certainly had no right to an evidentiary hearing before ICC in a proceeding not involving any injury to them and not entitling them to judicial review. Even if the District Court had been correct in holding that appellees later acquired standing to review the status order because of possible injury from the preferred stock order, this line of reasoning could not be projected into a holding that appellees, though without right at the time to an evidentiary hearing in the status proceeding, nevertheless became entitled to such a hearing because of what happened after the proceeding was concluded. How can one claim to be deprived of a hearing today if the right to that hearing depends upon what happens tomorrow?*

478-480, 489-492, 537-544). Appellees were thus afforded a reasonable opportunity to be heard and did in fact present their views at great length.

*The considerations mentioned above make irrelevant the provisions of the Administrative Procedure Act referred to in the preliminary opinion of the court below (R. 625-627). The provisions of that Act regarding hearing procedures are expressly made applicable only in cases "required by statute to be determined on the record after opportunity for an agency hearing" (5 U. S. C. § 1004).

B. The Sufficiency of ICC's Findings

Appendix II to the District Court's main opinion on final injunction states, as an alternative holding, that there was not sufficient evidence to support the Commission's findings that Alleghany controlled Central, and that these findings were deficient in form (R. 670).*

The evidence in the record supporting the finding that Alleghany controlled Central included a showing of the following facts:

1. Prior to the first status order Alleghany owned 286,000 shares of Central stock and had full voting rights to an additional 600,000, or a total voting strength of 886,000 shares out of approximately 6,500,000 shares outstanding (R. 263, 217).

2. The sworn statements in the joint Alleghany-Central application by an officer of Alleghany that Alleghany "recently acquired control of the Central" and that "Central is controlled by Alleghany" (R. 217, 218, 234).

3. The sworn statement of Central's vice president that the statements in the application are true (R. 234, 217-218).

4. The sworn statement by Alleghany as to interlocking officers and directors of Alleghany and Central (R. 217-218, 234).

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*The District Court in Appendix II also holds (again alternatively) that ICC should have made a finding on the question of whether Alleghany's control of Central was in the public interest (R. 670). It has already been shown above that Alleghany's acquisition of Central was not within the purview of §5(2)(a)(1) and therefore no finding of "public interest" was required. The term "public interest" in § 5 is a phrase of art relating solely to the effects on adequacy of transportation of a transaction under § 5(2)(a)(1). *United States* v. *Lowden*, 308 U. S. 225, 230 (1939).

5. Alleghany's board chairman beneficially owned 100,200, and its president 300,100, shares of Central stock (R. 218).

6. Admissions in the record by appellees themselves who at one point said to the ICC (R. 322):

> "* * * and since June 14, 1954, Alleghany and its nominees have taken further steps by stock purchases and otherwise to consummate and consolidate their control, including the appointment of various officers, and counsel of Alleghany as officers and counsel of New York Central."

In light of this, is is understandable that Division 4 found in its report:

> "We recognize that control of the Central System has passed to Alleghany by regular corporate procedures * * * (R. 435)
>
> "The capital stock of Central is widely held by the public, but control of its functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors. (R. 417)
>
> "* * * The important thing is that Alleghany does control one of our largest railroad systems and the regulation thereof in the public interest is our responsibility * * *" (R. 435)

and that the full Commission found in its report:

> "When Alleghany, by stock ownership and by the favorable action of the stockholders, acquired control of Central—* * * " (R. 511-512)
>
> "The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. * * * In our opinion the

power thus reposing in Alleghany constitutes control of Central." (R. 513)*

In its decision in the Boston & Albany proceeding, the ICC summarized its findings and the evidence in the Bridge Company status proceeding, reiterating that "in that proceeding we recognized that control of the Central System had been acquired by Alleghany" (R. 453).

It is difficult to see how anything other than control of Central by Alleghany could have been found on the above evidence in view of § 1(3)(b) of the Interstate Commerce Act which defines control as including, among other things, "the power to exercise control". Not even the appellees, who took a welter of confusing and contradictory positions before the ICC on the question of whether Alleghany controlled Central (R. 275-276, 280-281, 322, 395, 539), ever specifically disputed that this "power to exercise control" over Central did in fact repose in Alleghany. Moreover, § 1(3)(b) also defines control to include either actual or legal control exercised through common officers and directors, which here existed.

There is no basis for the District Court's holding that the findings were insufficient on the question whether Alleghany controlled Central. Findings in narrative form, adequately disclosing the essential basis of ICC's judgment are sufficient. *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216, 227 (1951); *United States* v. *Pierce Auto Freight*

*Nothing is subtracted from this unqualified finding by the ICC statements (mentioned by the court below, R. 622) that "Alleghany and its allied interests have succeeded in electing sufficient members of the [Central] board to permit them to organize and elect their own officers" and that control of the functions of Central "reposes in Alleghany and its officers" (R. 513, 417). In the statement referring to allied interests the ICC was merely recognizing that Alleghany took control of Central in a proxy fight where success requires "allied interests" in the form of like-minded stockholders. The statement as to Alleghany's officers does no more than recognize that a corporation acts, and can only act, through officers.

Lines, Inc., 327 U. S. 515 (1946); *Ward Transport* v. *United States*, 125 F. Supp. 363, 368 (D. Colo. 1954), *aff'd*, 348 U. S. 979 (1955); *New York* v. *United States*, 98 F. Supp. 855, 859 (N. D. N. Y. 1951); *Beard-Laney* v. *United States*, 83 F. Supp. 27, 31 (E. D. S. C. 1949). Here no court could be left in doubt by the statement in ICC's reports that ICC found Alleghany to be in control of Central or that the record abundantly supported that finding.

POINT V

REGARDLESS OF WHETHER ALLEGHANY IS SUBJECT TO REGULATION UNDER THE INTERSTATE COMMERCE ACT OR UNDER THE INVESTMENT COMPANY ACT, THE COURT BELOW ERRED IN ENJOINING ALLEGHANY'S PREFERRED STOCK ISSUE.

Even if it be assumed, contrary to the orders of both Commissions and to Alleghany's position, that Alleghany was within the coverage of the Investment Company Act and that the ICC was without jursdiction to approve Alleghany's preferred stock issue, the court below nevertheless erred in enjoining Alleghany and its representatives from issuing or transferring its new preferred stock.

This was error for at least two reasons: (1) the jurisdiction of a three-judge court under the Urgent Deficiencies Act is limited to enforcing, enjoining or setting aside orders of the Interstate Commerce Commission and does not extend to enjoining alleged violations of the Investment Company Act or stock issues by a corporation; (2) Alleghany's preferred stock was validly issued under applicable state law with the approval of large majorities of all classes of Alleghany's stockholders, and the issuance and transfer of the stock were not properly enjoinable.

A. The District Court Lacked Jurisdiction to Enjoin Issuance and Transfer of the Preferred Stock.

The District Court far exceeded its statutory jurisdiction in issuing an injunction enjoining Alleghany and its representatives from "taking any steps in connection with or in furtherance of the issuance" of its preferred stock, "or the transfer thereof." It sat as a specially constituted three-judge court "to enforce, enjoin, set aside, annul or suspend, in whole or in part" orders of the Interstate Commerce Commission (28 U. S. C. § 1336). But instead of confining itself to review of the ICC orders before it, the court went much further than the statute authorized—in effect partially invalidating a 1945 SEC order and purportedly enforcing the Investment Company Act.

The statutory procedure for the review of ICC orders derives from a 1910 Congressional enactment (36 Stat. 539) designed to provide expeditious final determination of the validity of certain ICC orders of national or widespread interest. *United States* v. *ICC*, 337 U. S. 426, 441 (1949). This method of judicial review has extraordinary features —a three-judge District Court, a direct appeal to this Court, and precedence in this Court over other cases. These extraordinary features were thought by Congress to be justified by the character of cases for which this special method of judicial review was provided. *United States* v. *Griffin*, 303 U. S. 226, 233 (1938). The creation of three-judge courts, one member of which must be a Court of Appeals judge, "entails a serious drain upon the federal judicial system"; and, in view of the provisions for direct review by this Court, a loose construction of jurisdictional requirements "would defeat the purposes of Congress * * * to keep within narrow confines our appellate docket." *Phillips* v. *United States*, 312 U. S. 246, 250 (1941).* Strict adherence to the jurisdictional requirements is therefore essential.

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*See in addition *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (1947); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949).

This Court has repeatedly pointed out that the function of a three-judge court, sitting in review of an ICC order, is strictly limited. It is limited to ascertaining whether ICC has proceeded on erroneous legal principles; if so, ICC should be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 136 (1939). Relief is limited to setting aside or enjoining ICC's order and remanding the cause to it for further consideration. *United States* v. *Jones*, 336 U. S. 641, 672-673 (1949). What this Court said in *United States* v. *Pierce Auto Freight Lines Inc.*, 327 U. S. 515, 535-536 (1946), has precise application here:

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '. . . the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done."

Here the District Court did not adhere to these principles and does not appear to have recognized any limitation upon its function. Actually it reached its jurisdictional limit and performed its sole function when it decided, however erroneously, to annul the ICC orders before it. It was without power to go further and decide that, under the complex provisions of the Investment Company Act, appellees were entitled to an injunction against Alleghany's preferred stock issue. Dissenting Judge Hincks correctly observed that there was no reason to believe the case fell within the policy of the Investment Company Act which the majority are "assuming indirectly to enforce" (R. 633). He added

that he could find nothing in the Investment Company Act "which gives investors in investment companies a right to enforce its policies", and after reviewing the structure of that Act he said (R. 633):

> "In the light of these carefully limited provisions I think it wholly inadmissible to interpret the Act as according to any private party, whether an investor or a potential investor, a right to enforce the policy of the Act as he conceives it to be. Nor do I think that this court, in the exercise of jurisdiction under the Urgent Deficiencies Act, has carte blanche to enforce its conception of the policy of the Investment Company Act."

B. Even Assuming Alleghany to be Within the Coverage of the Investment Company Act, Its New Preferred Stock Was Validly Issued under State Law and Was Not Properly Enjoinable.

Nothing in the Investment Company Act warrants an injunction against transfer of the shares of Alleghany's new preferred stock. Section 7 of the Investment Company Act is quite different from § 20a(11) of the Interstate Commerce Act, which declares that any security issued by a carrier without ICC authorization shall be void.* While § 7 provides that no unregistered investment company shall sell securities, it does not declare that stock issued in violation of the section is void or non-transferable.

Alleghany is a Maryland corporation, and the validity and transferability of its securities are governed by Mary-

*§ 20a(11) further provides that no security issued in accordance with the terms of an ICC order of authorization shall be rendered void because of failure to comply with procedural requirements. Thus if, as Alleghany contends, ICC had jurisdiction to approve the preferred stock exchange offer, the stock is validly issued regardless of whether or not the court below was correct in holding that there were procedural errors in the ICC's proceedings preceding the entry of its order.

land law.* Under that law Alleghany's 6% preferred stock is validly issued and outstanding and should not have been enjoined.** Noncompliance with a federal law, such as § 7 of the Investment Company Act, would not destroy validity of shares in the hands of innocent holders or warrant an injunction against transfer or distribution of the shares.***

The preferred stock exchange offer was approved by over 97% of the common stock voting upon it (over 70% of the entire class) and by large majorities of Alleghany's two classes of outstanding preferred stock (R. 79, 648). Nevertheless the District Court blocked the entire issue of new preferred stock.

The results of the court's action are serious in the extreme for Alleghany and for its stockholders. Alleghany cannot pay dividends, elect directors or hold an annual meeting. Moreover, the District Court's retroactive subjection of Alleghany to the status of an unregistered investment

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*The law of the State of incorporation governs as to when stock is deemed issued. *In re Fryeburg Water Co.*, 79 N. H. 123, 106 A. 225 (1919); *McMillen* v. *Lamb*, 166 N. Y. Supp. 656 (Sup. Ct. Erie Co. 1917); 11 *Fletcher*, Private Corporations, § 5156 (Rev. and perm. ed. 1932).

**This is true not only as to the 900,000 shares for which certificates were physically delivered to the recorded owners but also with regard to the 400,000 shares still in the hands of the Exchange Agent. Before the initial restraining order was issued below, Alleghany's stock books reflected the transfer of all the stock; the stock had been registered in the names of those who had tendered their old 5½% preferred stock to the Exchange Agent for exchange. These steps effected issuance of the stock; the actual certificates are merely the documentary evidence of issuance. *Pacific National Bank* v. *Eaton*, 141 U. S. 227, 234 (1891); *Baltimore City Pass Ry.* v. *Hambleton*, 77 Md. 341, 26 A. 279, 281 (1893).

***See *A. C. Frost Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38 (1941); *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940). Even fraudulently issued stock may be valid stock in the hands of holders. *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 N. J. 433, 86 A. 2d 201 (Sup. Ct. 1952); *Modern Industrial Bank* v. *Taub*, 135 N. J. L. 91, 47 A. 2d 348 (Ct. Err and App. 1946).

company throws open to question Alleghany's corporate conduct ever since the rather obscure date when Alleghany, on the court's view, reverted to investment company status. Under §§ 7 and 47 of the Investment Company Act, an unregistered investment company may not carry on business of any kind in interstate commerce or through the mails, and its contracts are declared to be "void". The District Court's decision thus might have the effect of retroactively invalidating many of Alleghany's contracts and transactions since at least January, 1954 and perhaps longer, despite Alleghany's belief during that period, based on orders by ICC and SEC, that it was not an investment company. The hardship and uncertainty thereby effected would be felt not only by Alleghany, but by many who have dealt with it in good faith.

The consequences of the District Court's decision are calamitous for Alleghany's stockholders as well. Thousands of them have received new preferred stock now made unmarketable, except in hand-to-hand transactions, by a court order rendering it neither transferable, salable nor bankable. Others have surrendered their old stock but are prevented by the court's order from receiving certificates for the new. All of them are left with a frozen asset, deprived of their capital and their dividends, and denied the use of their money to meet obligations or expenses or even to provide for payments of estate taxes upon the stock itself. Preferred stockholders have been subjected to serious difficulty and embarrassment by having bank loans called because of evaporation of their collateral by the District Court's decree (R. 75-80, 101, 151-153).

In the light of the foregoing facts, the District Court, in interfering with transfer and distribution of the new preferred stock, not only exceeded its jurisdiction under the Urgent Deficiencies Act, but also took action which would have been an abuse of discretion even if jurisdiction had existed.

CONCLUSION

The judgment of the District Court should be reversed in all respects and its injunction vacated.

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Dated: December 14, 1956

APPENDIX

Interstate Commerce Act, Part I:

Section 1(3)(b), 24 Stat. 379 (1887), as amended, 49 U. S. C. § 1(3)(b)(1952), provides:

> "For the purposes of sections 5, 12(1), 20, 304(a), (7), 310, 320, 904(b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

Section 5(2), 24 Stat. 380 (1887), as amended, 49 U. S. C. § 5(2)(1952), provides in relevant part:

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier; or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their

stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a) of this section, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an

applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Section 5(2)(b), as it existed from 1940 until amended in 1949, 54 Stat. 906 (1940) provides:

"Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not

enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Section 5(3), 24 Stat. 380 (1887), as amended, 49 U. S. C. § 5(3)(1952), provides:

"Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20 (1)-(10), 304 (a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a (2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of sections 20a and 314 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest."

Section 15(2), 24 Stat. 384 (1887), as amended, 49 U. S. C. § 15(2)(1952), provides:

"Except as otherwise provided in this chapter, all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall con-

tinue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction."

Section 16(6), 24 Stat. 384 (1887), as amended, 49 U. S. C. § 16(6) (1952), provides:

"The commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

Section 17(3), 24 Stat. 385 (1887), 49 U. S. C. § 17(3) (1952), provides in relevant part:

"All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest."

Section 20a(2), 41 Stat. 494 (1920), as amended, 49 U. S. C. § 20a(2) (1952), provides:

"It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes

such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Section 20a(6), 41 Stat. 495 (1920), as amended, 49 U. S. C. § 20a(6) (1952), provides:

"Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

Section 20a(11), 41 Stat. 496 (1920), as amended, 49 U. S. C. § 20a(11) (1952), provides:

"Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accord-

ance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligations or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney, or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the commission's order or orders in the premises, or any application not authorized by the commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court."

Interstate Commerce Act, Part II:

Section 221(b), 49 Stat. 564 (1935), as amended, 49 U. S. C. § 321(b) (1952), provides:

> "Except as otherwise provided in this chapter, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Section 1005(a), 52 Stat. 1023 (1938) 49 U. S. C. § 645(a) (1952), provides:

> "Except as otherwise provided in this chapter, all orders, rules and regulations of the Board shall take effect within such reasonable time as the Board may prescribe, and shall continue in force until its further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided,* That whenever the Board is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Board is authorized, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided further,* That the Board shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter."

Interstate Commerce Act, Part III:

Section 315(d), 54 Stat. 946 (1940), as amended, 49 U. S. C. § 915(d) (1952), provides:

> "Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Section 322(a), 54 Stat. 951 (1940), 49 U. S. C. § 922 (1952), provides:

> "Notwithstanding the provisions of section 920 of this title, or any other provision of this chapter, all orders, rules, regulations, permits, tariffs (including rates, fares, charges, classifications, rules, and regulations relating thereto), contracts, or agreements, to the extent that they were issued, authorized, approved, entered into, or filed under any provision of law repealed by this chapter, and are still in effect, shall continue in force and effect according to the terms thereof as though this chapter had not been enacted, except that the Commission may modify, set aside, or rescind any such order, rule, regulation, permit, tariff, contract, or agreement to the extent that it finds the same to be in violation of any provision of this chapter or inconsistent with the national transportation policy declared in the Interstate Commerce Act."

Investment Company Act of 1940:

Section 3(c)(9), 54 Stat. 799 (1940), as amended, 15 U. S. C. § 80a-3(c)(9) (1952), provides:

"(c) Notwithstanding subsections (a) and (b), none of the following persons is an investment company within the meaning of this title:

* * * * *

"(9) Any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company: *Provided,* That the assets of the controlled company consist substantially of securities issued by companies which are subject to regulation under the Interstate Commerce Act."

Section 6(c), 54 Stat. 802 (1940) 15 U. S. C. § 80a-6(c) (1952), provides:

"The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title."

Section 7(a), 54 Stat. 802 (1940) 15 U. S. C. § 80a-7(a) (1952), provides in relevant part:

"(a) No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 8, shall directly or indirectly

"(1) offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such secur-

ity or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce;

"(2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person";

Section 8(f), 54 Stat. 805 (1940), 15 U. S. C. § 80a-8(f) (1952), provides:

"(f) Whenever the Commission, on its own motion or upon application, finds that a registered investment company has ceased to be an investment company, it shall so declare by order and upon the taking effect of such order the registration of such company shall cease to be in effect. If necessary for the protection of investors, an order under this subsection may be made upon appropriate conditions. The Commission's denial of any application under this subsection shall be by order."

Securities Act of 1933:

Sections 3(a)(6) and (9), 48 Stat. 75 (1933), as amended, 15 U. S. C. § 77c(a)(6) and (9) (1952), provide:

"Sec. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

* * * * *

"(6) Any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;

* * * * *

"(9) Any security exchanged by the issuer with its existing security holders exclusively where no

commission or other remuneration is paid or given directly or indirectly for soliciting such exchange; * * *."

Securities and Exchange Commission Rule X-12A-5, 17 CFR, 1955 Supp., § 240.12a-5, provides:

"*Temporary exemption of substituted or additional securities.* (a) (1) Subject to the conditions of subparagraph (2) of this paragraph, whenever the holders of a security admitted to trading on a national securities exchange (hereinafter called the original security) obtain the right, by operation of law or otherwise, to acquire all or any part of a class of another or substitute security of the same or another issuer, or an additional amount of the original security, then:

"(i) All or any part of the class of such other or substituted security shall be temporarily exempted from the operation of section 12 (a) to the extent necessary to render lawful transactions therein on an issued or 'when-issued' basis on any national securities exchange on which the original, the other or the substituted security is lawfully admitted to trading; and

"(ii) The additional amount of the original security shall be temporarily exempted from the operation of section 12 (a) to the extent necessary to render lawful transactions therein on a 'when-issued' basis on any national securities exchange on which the original security is lawfully admitted to trading.

"(2) The exemptions provided by subparagraph (1) of this paragraph shall be available only if the following conditions are met:

"(i) A registration statement is in effect under the Securities Act of 1933 to the extent required as to the security which is the subject of such exemption, or the terms of any applicable exemption from

registration under such act have been complied with, if required;

"(ii) Any stockholder approval necessary to the issuance of the security which is the subject of the exemption, has been obtained; and

"(iii) All other necessary official action, other than the filing or recording of charter amendments or other documents with the appropriate State authorities, has been taken to authorize and assure the issuance of the security which is the subject of such exemption."

United States Judicial Code:

Sections 1336 and 2321-2325, Title 28, U. S. C. §§ 1336, 2321-2325 (which succeed the Urgent Deficiencies Act, 38 Stat. 219 (1913)) provide as follows:

§ 1336. *Interstate Commerce Commission's orders*

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

§ 2321. *Procedure generally; process*

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

§ 2322. *United States as party*

"All actions specified in section 2321 of this title shall be brought by or against the United States."

§ 2323. *Duties of Attorney General; intervenors*

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

"The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein."

§ 2324. *Stay of Commission's order*

"The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation

of the order pending the final hearing and determination of the action."

§ 2325. *Injunction; three-judge court required*

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 36

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS JOSEPH S. GRUSS ET AL.

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Supreme Court of the United States

OCTOBER TERM, 1956

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated, *Appellants,* *v.* BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated, *Appellees.*	No. 36

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS JOSEPH S. GRUSS ET AL.

OPINIONS BELOW

The opinion of the District Court granting a permanent injunction (R. 651-673) is reported at 138 F. Supp. 123. Two supplemental opinions are not reported (R. 674-675, 680). Memorandum opinions of January 27, 1956 denying the motion of Alleghany Corporation (hereinafter "Alleghany") for a new trial and a further motion for reargu-

ment are reported at 138 F. Supp. 138 (R. 675-678, 679-680).

The majority and minority opinions of the District Court on interlocutory injunction are reported at 134 F. Supp. 132 (R. 601-628, 628-639). Opinions in favor of and denying supersedeas pending appeal are not reported (R. 639, 642).

Mr. Justice Harlan's opinion, granting partial supersedeas pending appeal, is reported at U. S. , 75 Sup. Ct. 912 (R. 643-650).

The Reports of Division 4 of the Interstate Commerce Commission (hereinafter "ICC") and of the full Commission, respectively dated March 2 and May 24, 1955, relating to ICC's jurisdiction over Alleghany are reported at 290 I. C. C. 725 and 295 I. C. C. 11 (R. 414-446, 506-515). The Report of Division 4 dated May 26, 1955 relating to an exchange of Alleghany securities is not reported (R. 518-536). The Report of Division 4 dated March 22, 1955, approving additional acquisitions of control of carriers is not reported (R. 450-471).

JURISDICTION

The final decree of the District Court was entered December 23, 1955 (R. 555-557); motions for a new trial and reargument were denied January 27, 1956 (R. 675-680); the appellants Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership doing business as Gruss & Co., filed their notice of appeal on February 1, 1956 (R. 22-24). Jurisdiction of this Court is invoked under 28 U. S. C. sections 1253 and 2101(b). By order dated April 23, 1956 these appellants were granted leave to join in the jurisdictional statement of Alleghany and probable jurisdiction was noted (351 U. S. 903) (R. 681).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and the Investment Company Act of 1940 are set forth in the Appendix, at the conclusion of this brief.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission had jurisdiction to enter orders approving the issuance of new 6 per cent convertible preferred stock in exchange for Alleghany's old 5½ per cent preferred stock.

2. Whether appellees, as holders of common stock of Alleghany, had the standing to challenge ICC orders making Alleghany subject to ICC supervision and control and approving the exchange of such securities.

3. Whether it was proper for the District Court temporarily or permanently to enjoin the completion of delivery of said preferred stock, thus causing irreparable damage to innocent preferred stockholders who had deposited their old preferred stock and received either "window-tickets" or frozen securities in exchange.

STATEMENT

This is a direct appeal from the judgment of a three-judge District Court, enjoining and annulling two sets of orders of the Interstate Commerce Commission and granting an injunction against the completion of an exchange of Alleghany preferred stock which had been approved by two of the orders annulled (R. 555-557).

These appellants, in common with the holders of more than 130,000 out of approximately 136,000 shares of Series A 5½% preferred stock of Alleghany Corporation, prior

to June 7, 1955, deposited their shares with a bank serving as an exchange agent with the understanding that upon approval by the Interstate Commerce Commission of an exchange offer—previously approved by the overwhelming majority of all classes of Alleghany stockholders—they would receive in exchange new convertible preferred stock (R. 76).

The Interstate Commerce Commission entered orders dated May 26, 1955 and June 22, 1955, approving the exchange offer (R. 536-537, 554). As a result of the issuance of the judgment below, and the restraining order and temporary injunction which preceded it, some preferred stockholders have nothing but window receipts for their deposited shares, while others, to whom the new shares were delivered before the issuance of the restraining order, are holders of the new preferred shares. However, such new shares cannot be sold, traded or used as collateral and no dividends have been or can be declared upon them while the judgment appealed from remains unreversed (R. 77-78).

Proceedings before the Commission

Since a full statement of the proceedings before the Interstate Commerce Commission will, undoubtedly, be found in the briefs of the Commission and Alleghany, these appellants will present a skeletonized survey of such proceedings and of the events leading to the issuance of the injunction which has caused injury to the preferred stockholders.

By order dated May 24, 1955 (R. 516-517) the ICC affirmed the order of its Division 4 dated March 2, 1955 (R. 446-448) holding that the Alleghany Corporation should continue to be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act. Previously, by order dated June 5, 1945, the ICC had

asserted its regulatory jurisdiction over Alleghany until its further order (R. 183-185).

The other set of orders, annulled by the determination below, consisted of the order of Division 4 dated May 26, 1955 (R. 536-537) and the order of the Commission dated June 22, 1955 (R. 554) which approved an exchange offer made by Alleghany to its preferred stockholders, pursuant to which new 6% convertible preferred stock was to be exchanged for its Series A 5½% preferred stock.

The exchange offer

By May of 1955, there had accrued dividend arrearages of $132 on each of the 136,744 shares of Alleghany's outstanding Series A 5½% preferred stock (hereinafter "old preferred") (R. 524, 526-527). Alleghany was not in a position to pay off these arrearages in cash (R. 529).

On January 14, 1955, the directors of Alleghany gave notice of a meeting of stockholders to vote on charter amendments designed to implement a proposed exchange of new 6% convertible preferred stock (hereinafter "new preferred") for the old preferred (R. 282-286). Following the submission of proxy material to the Securities and Exchange Commission (hereinafter "SEC") and the distribution of the material to the stockholders (R. 282-311), all classes of Alleghany stockholders—including 97½% of the voting common stockholders—voted overwhelmingly to approve the exchange offer and the necessary charter amendments (R. 79, 520, 534). The offer was conditioned upon the making of an appropriate order by the ICC (R. 332) to which application was made on February 18, 1955 (R. 371-392).

In essence, the plan (R. 331-364) provided for the exchange of ten shares of $10 par new preferred stock for each share of $100 par old preferred stock. The new preferred was to be convertible into common stock in accord-

ance with a formula designed to give to holders of the old preferred the equivalent in common stock of the redemption value—$105—of their old preferred stock plus the dividend arrearages of $132 (R. 524-525). The formula employed the market price of the common stock on a fixed date, later changed by the ICC (R. 535). The application of the formula made each share of the new preferred stock convertible into 4.7 shares of common stock upon payment of $3.75 to Alleghany for each such share of common stock (R. 114-115). To induce acceptance of this offer, the preferred stockholders were given an extended period within which to exercise the conversion privilege.

This tax-free exchange was designed to eliminate $18,000,000 of dividend arrearages on the old preferred stock so that the common stock might for the first time in 25 years be legally permitted to receive dividends (R. 294-295, 351).

The ICC approved the exchange offer after hearing objections from and a petition for reconsideration by the appellees Breswick and Phillips, who intervened in the proceedings before the Commission (R. 537-544).

The complaint in this action

In bringing this action for annulment of the status orders of the ICC (R. 32-53) and, upon amendment (R. 94-100), of its orders approving the exchange offer, appellees Breswick and Phillips asserted irreparable damage by virtue of their being deprived of SEC supervision and control over Alleghany, alleging that:

> "27. The defendant I.C.C. has illegally and unlawfully arrogated to itself the power to regulate Alleghany under the Interstate Commerce Act, and has illegally and unlawfully deprived plaintiffs and all other common stockholders of Alleghany of the rights and protections accorded to them under the

Investment Company Act, and continues so to do, to their irreparable prejudice and damage" (R. 38).

On June 23, 1955, the day on which the ICC order of approval was made known, thus putting the plan in operation, appellees obtained an *ex parte* order in the District Court restraining the completion of the physical delivery to the holders of the new preferred stock and the transfer of any such stock already delivered (R. 56).

Preferred stockholders intervene

Appellants Joseph S. Gruss, et al., doing business as Gruss & Co., on behalf of themselves and other preferred stockholders similarly situated (R. 76, 80), thereupon moved to intervene, to vacate the restraining order, to advance the hearing on plaintiffs' application for a preliminary injunction and in the alternative to require appellees to post an adequate bond (R. 74-75).

In applying for intervention these appellants described the effect of the restraining order upon their firm, which had delivered for exchange 1,100 shares of the old preferred stock (R. 75-80). Prior to the issuance of such restraining order, they had received in exchange for 1,000 shares of the old stock 10,000 shares of the new preferred stock, but had been prevented from receiving the remaining 1,000 new shares to which they were entitled. This resulted because only 900,000 of the approximately 1,300,000 shares of the new stock had been physically delivered before delivery was halted by the restraining order.

Gruss & Co. advised the Court that prior to the issuance of the restraining order some 100,000 shares of the new preferred had been dealt with on a when-issued basis on the New York Stock Exchange. They added that (1) as a result of the restraining order, firms such as Gruss & Co. would not be in a position to deliver securities which

they had sold, or to receive payment therefor; (2) the firm had sold approximately $250,000 of the new preferred stock, which transaction could not be completed; (3) commitments had been made in the expectation of receiving said sum; (4) the firm had purchased stock for customers upon their deposit of the required margin, and was not in a position to fulfill its obligations to its customers, nor to protect itself against loss in the event of a change in the market; (5) the new stock while under restraint would have no market value, could not be bought, sold, traded, or hypothecated.

They pointed out that the appellees represented only .0002 of the common stockholders of Alleghany and that 97.5 per cent of the voting common stockholders had previously approved the exchange offer, the completion of which would immediately add approximately $3.80 to the net asset value of each share of common stock and would afford the holders of such stock the opportunity to receive dividends for the first time in 25 years (R. 75-80).

The application for intervention then stated:

> "This Court may take judicial notice of the difficulties, hardships and uncertainties that necessarily flow from the freezing, by the restraining order, of securities having a value in excess of forty million dollars. A stockholder needing cash is not in a position to sell his stock. Brokers are unable to meet their requirements. Those who have sold said new stock will not receive the cash to which they are entitled, as they would except for the issuance of the restraining order herein. Many thousands of shares of the old preferred stock were undoubtedly pledged with banks and brokers, who, at the request of the stockholders, surrendered the old stock in anticipation of the receipt of the new. The restraining order prevents the consummation of these transactions with the result that preferred stockholders in such position will undoubtedly be called upon to

post other collateral. Indeed, our firm is in this very position.

"* * * The new stock has no market value, since the restraining order has destroyed any proper market. Until the injunction is lifted, no one will be in a position to buy, sell, trade in or hypothecate these securities" (78).

Intervention was granted, but a divided court, Hincks, C. J., dissenting, denied the motion to vacate the restraining order (R. 84).

Because of the urgency of the situation, as depicted by these preferred stockholders, their application to advance the hearing on appellees' application for an interlocutory injunction was granted. Plaintiff's motion for a temporary injunction was granted on July 21, 1955 (R. 601-628), with Circuit Judge Hincks again dissenting (R. 628-639).

The applications for supersedeas before the District Court and Mr. Justice Harlan

Thereafter, an application was made for a stay of the interlocutory injunction in the District Court. By an equally divided court, it denied the pleas of these intervening stockholders and other appellants to dissolve the restraining order on Alleghany's posting a bond (R. 639-642). District Judge Dimock, whose view prevailed on this application, granted recognition to, but no relief from, the "plight of innocent stockholders who have given up their old preferred stock and have got a frozen asset in return" (R. 641).

In his dissent, Judge Hincks, referring to the injunction restraining the completion of the exchange offer, stated: "This feature of the injunction has its chief impact on innocent stockholders," and he found the injunction to be unnecessary "to protect plaintiffs' pecuniary interest" (R. 642).

An application for a supersedeas to Mr. Justice Harlan followed. In granting a partial stay, he declared that he was

> "most impressed with the prejudice which continuance of this injunction will work on the preferred stockholders (R. 647).
>
> * * *
>
> "But for the fact that staying the injunction to the full extent that it affects the preferred stock issue might render moot the whole appeal from that part of the injunction, I would be disposed to grant that relief. * * * Under the circumstances, I think the fair thing to do is to stay the injunction in so far as it relates to the 900,000 shares of new preferred stock which already have been issued, and let the injunction stand as regards the 400,000 unissued shares" (R. 648).

Despite such stay, which was continued in the final judgment (R. 555-557), the holders of the 900,000 shares receive no dividends and the shares are still not cleared for trading by either the New York Stock Exchange or the National Association of Security Dealers. Thus, for all practical purposes, the $40,000,000 of securities involved, which are held by the general public, continue to be, pending a decision of this Court, non-negotiable, non-pledgable and, of course, yield no income.

The final judgment

Upon the basis of the record of proceedings before the Interstate Commerce Commission and the pleadings, the Court below, with Circuit Judge Frank substituting for Judge Hincks, directed the entry of a final judgment annulling the ICC's status and finance orders and made final the injunction which had been granted *pendente lite* (R. 651-675, 680). The opinion which directed the entry of the final judgment adhered, except with slight modifications, to the majority's earlier opinion on the motion for an interlocutory injunction.

The application before the SEC

Following the entry of the final judgment herein, Alleghany, in compliance with the requirements of that judgment, registered with the SEC under protest and then along with *some* preferred stockholders applied to the SEC for exemption of the new preferred from certain provisions of the Investment Company Act and for retroactive approval of the exchange offer.

As stated in the memorandum submitted to this Court on behalf of these appellants in opposition to appellees' statement suggesting mootness, "The appellants herein *did not* join in that application" (p. 5).

Protracted hearings were had before the Division of Corporate Regulation of the SEC, which recommended that the application be granted. The Commission, however, by a 4 to 1 vote, refused to confirm the Division's recommendation and denied the application on November 30, 1956. In doing so, the SEC, as would be expected, gave due consideration to the opinions and judgment of the District Court below and made its decision in conformance therewith.

In any event, this appeal, certainly in so far as it is brought by the appellant Interstate Commerce Commission and by these preferred stockholders, is not affected either by the application of Alleghany or other stockholders or by the determination on such application. Neither the ICC nor these appellants appeared or were represented before the Securities and Exchange Commission.

The majority opinion granting an interlocutory injunction

The majority concluded that the appellees, as minority common stockholders, were entitled to an interlocutory injunction. They resolved all issues of law in favor of plaintiffs (R. 107), holding:

1. That the orders were reviewable because "the I.C.C. granted an exemption from the terms of the Investment Company Act" and because jurisdiction had "been exercised by the adoption of the order approving the issue of the preferred stock" (R. 606-607).

2. That plaintiffs, as minority stockholders, had standing to review the orders because those who controlled the corporation "by obtaining an erroneous ruling from the I.C.C. * * * have succeeded in escaping the provisions of" (R. 608) the Investment Company Act, that "the effect of the action of the I.C.C. is to deprive the stockholders of an independent right not to have their status changed except as permitted by the terms of the Investment Company Act" (R. 611), and that plaintiffs showed "legal injury when they demonstrate that, because of an erroneous ruling by the I.C.C. as to their status, they are subject to possible injury from which they would otherwise be protected. The order under review has exempted the management from the restrictions of the Investment Company Act" (R. 612).

3. That it was not necessary for the plaintiffs to show irreparable damage beyond showing that they do not have an adequate remedy at law and since plaintiffs had "this right to invoke the protection of the Investment Company Act against an unlawful assumption of jurisdiction by the I.C.C., they have no adequate remedy at law to vindicate that right" (R. 613).

4. That Alleghany was not entitled to be considered a carrier pursuant to Section 5(3) of the Interstate Commerce Act, that there was a failure to find that Alleghany's control of New York Central is " 'consistent with the public interest,' " that the finding of such control was inadequate and that plaintiffs had not been granted a proper hearing before the ICC (R. 615-627).

Circuit Judge Hincks' dissenting opinion

Judge Hincks dissented. In his view, plaintiffs were not entitled to an injunction even on the assumption that the status orders were later to be annulled. He held that plaintiffs showed no irreparable damage—that "loss of opportunity to give vent to malice is not the equivalent of irreparable damage" (R. 632). He found nothing in the Investment Company Act which gives investors a right to enforce its policies, though the SEC itself is given the power to bring actions to enjoin violations of the Act. In Judge Hincks' opinion, deprivation of the benefits of the Investment Company Act, "which the plaintiffs concede has no measurable pecuniary value, is not 'irreparable damage'" (R. 634).

Weighing the slight disadvantage to the plaintiffs that a denial of the injunction would mean, as against the hardships its issuance would inflict upon the corporation and its preferred stockholders, Judge Hincks was of the opinion that a temporary injunction was unwarranted (R. 634-639).

The District Court's opinion in granting final judgment

The Court's second opinion avowedly declared adherence "for the most part, to what was said in the previous majority opinion" (R. 652). The Court first rejected the claim that the ICC acquired jurisdiction by reason of Alleghany's application which gave rise to the status orders here under consideration (R. 652-655).

It then considered defendants' claim that pursuant to Section 15(2) of the Interstate Commerce Act, the jurisdiction of the ICC continued as a result of its order of June 5, 1945, the order and the Section providing that such order should continue in force until further order of the Commission or action by a court of competent jurisdiction.

The District Court, citing *United States* v. *American Railway Express Co.*, 265 U. S. 425, 430, n. 3 (1924), held that Section 15(2) of the Interstate Commerce Act

deals only with rate orders (R. 655) and that the ICC order of June 5, 1945 became inoperative just as soon as there was a change in the facts which gave rise to it—"when Alleghany divested itself of the control of all carriers" (R. 656). In consequence, the Court found that Alleghany was not within ICC regulation when it approved the exchange offer and that being then an unregistered investment company subject to the Investment Company Act, Alleghany could not lawfully issue the new preferred stock (R. 657).

The District Court similarly held that the SEC order of 1945, which excepted Alleghany from the Investment Company Act until its further order, likewise lost its efficacy when there was a change respecting the facts which gave rise to that order (R. 657-660).

As for the plea of the intervening preferred stockholders, the Court merely stated that they could not be granted relief, because their plight was the result of reliance "upon void orders" (R. 662). The Court, therefore, found that both the status orders and the orders approving the issuance of Alleghany's preferred stock "must be set aside as null and void" (R. 663) and the temporary injunction was made permanent (R. 674).

SUMMARY OF ARGUMENT

We shall not repeat the argument which undoubtedly will be made by the appellants ICC and Alleghany with respect to the ruling of the District Court that Alleghany, although in control of New York Central, the nation's second largest railroad, was no longer subject to regulation by the ICC. The position of the preferred stockholders is that even if this Court should affirm this holding of the District Court, the District Court was not justified in enjoining the completion of the delivery and transfer of Alleghany's new preferred stock, with consequent damage to innocent third parties. We say this on two principal grounds.

I

Prior to the filing of the applications resulting in the issuance of the status orders herein, Alleghany was subject to the jurisdiction of the ICC by order dated July 5, 1945. Such jurisdiction was continued by the Commission's 1955 order. Both orders provided that they were to remain in effect until the ICC's further order (R. 185, 447).

Section 15(2) of the Interstate Commerce Act provides that except as otherwise provided in

> "this chapter, all orders of the commission, other than orders for the payment of money, * * * shall continue in force until its further order * * * unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction."

Section 15(2) applies to Section 5 orders. *The Chicago Junction Case*, 264 U. S. 258, 270 (1924). *United States* v. *American Railway Express Co.*, 265 U. S. 425, n. 3, 430, 431 (1924) holds nothing to the contrary.

The soundness of the requirement that jurisdiction of the ICC continue until further order of the Commission or action by a court of competent jurisdiction is hardly open to question. Cessation of regulation by the ICC should not be left to circumstance or to a determination by the regulated corporation.

Nor should stockholders or the general public, in dealing with a corporation made subject to the Interstate Commerce Act, be required to face the possibility that rules and orders of the Commission may later be nullified *nunc pro tunc* at the instance of the holder of a minute portion of the stock of the regulated company.

Thus, until the judgment of the Court below was entered, the Interstate Commerce Commission had jurisdiction to approve the exchange offer herein and such approval should

not have been affected retroactively by the later judgment of the Court below.

II

A three-judge court, convening pursuant to the Urgent Deficiencies Act, though of limited jurisdiction, is a court of equity. Equitable principles govern its procedures and determinations. *Alabama* v. *United States*, 279 U. S. 229, 230 (1929), *Inland Steel Co.* v. *United States*, 306 U. S. 153, 156 (1939); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132, 136 (1939).

A. The District Court should not have enjoined the completion of the delivery of the stock at the instance of minority common stockholders. They could claim no "legal injury" by virtue of the corporation's regulation by the ICC rather than the SEC. Congress, by enacting Section 3(c)(9) of the Investment Company Act exempting from its ambit companies subject to regulation by the ICC, demonstrated its confidence in the ICC and appellees may not be heard to assert that regulation under the Interstate Commerce Act and/or deprivation of supervision under the Investment Company Act constitute either legal injury or irreparable damage.

B. The application of sound equitable principles required a denial of the permanent injunction granted below against the issuance, distribution and transfer of Alleghany's new preferred stock pursuant to the exchange offer approved by the Commission.

That the preferred stockholders were innocent of any wrong is indisputable. That they have suffered irreparable damage and incalculable harm by the freezing of their securities is likewise undisputed.

Appellees, by claiming that they are entitled to the protection afforded by the Investment Company Act and

supervision by the SEC, assert no irreparable damage justifying the granting of extraordinary relief by way of injunction.

Even if we were to assume that appellees did suffer some slight injury from allegedly erroneous retention of jurisdiction over Alleghany by the Commission, such injury could hardly be compared with the great harm that has been imposed upon the preferred stockholders by the injunction granted below.

The right to an injunction is never an absolute one, and it is not granted as a matter of course. The harm that will be inflicted upon even a wrongdoer is measured against the harm which would be occasioned by denial of an injunction. The hardship caused by the sweeping injunction appealed from—issued at the behest of common stockholders who could show no greater damage than that their company would be subject to the jurisdiction of one federal agency rather than another—has been inflicted upon innocent third parties. The Court below erred in granting such an injunction and in refusing to give any consideration to such hardship.

POINT I

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION APPROVING THE ISSUANCE OF ALLEGHANY'S NEW PREFERRED STOCK WERE NOT VOID; THE COMMISSION HAD POWER TO ENTER SUCH ORDERS EVEN IF ITS 1955 STATUS ORDERS WERE ERRONEOUS.

For ten years prior to the issuance of the ICC orders under review, Alleghany Corporation was subject to the supervision of the Interstate Commerce Commission by virtue of its then control of the Chesapeake & Ohio and other carriers. In 1955, as a result of a proxy fight, it

acquired control of New York Central, one of the nation's greatest railroad networks. Whether by reason of such control, Alleghany should continue to be subject to the Interstate Commerce Act and to regulation by the ICC is a question of great importance, affected with a paramount public interest.

Though it may appear otherwise in the opinion below, submission to such jurisdiction is an obligation. It is not a privilege to be sought or waived. Pursuant to Section 12 of the Interstate Commerce Act, the ICC is "required to execute and enforce the provisions of" the Act.

Since it is our contention that stockholders have no right to challenge ICC jurisdiction, but that that is a matter between the Commission representing the public and the corporation itself, the argument on this issue will be left to appellants ICC and Alleghany.

Assuming, however, that the Court below properly annulled the 1955 status orders providing for continuing ICC jurisdiction over Alleghany based upon its acquisition of control of New York Central, that should not make void administrative orders issued by the Commission prior to the entry of the judgment below.

We contend that where a federal administrative body assumes jurisdiction, persons relying on its administrative actions should not suffer damage by virtue of a later decision denying jurisdiction to such agency in favor of a coordinate agency. This rule should apply especially where, as here, an order was entered in June of 1945 making Alleghany subject to the provisions of the Interstate Commerce Act, which order by its terms was to remain in effect, in conformance with Section 15(2) of the Interstate Commerce Act, "unless and until otherwise ordered by" the ICC (R. 185). Such order and a similar 1955 status order should not have been declared ineffective retroactively.

A. The ICC order of approval of the exchange offer did not become null by virtue of a later determination of Alleghany's status under the Interstate Commerce Act.

Whether or not Alleghany should have been or should in the future be subject to the Interstate Commerce Act is a matter of small concern to its preferred stockholders. What is important to them is that their stock, the issuance of which received administrative approval by the ICC, should not be considered illegal and void, thus imposing untold hardship upon such stockholders.

Great havoc has been wrought by the issuance of the injunction below despite the fact that Mr. Justice Harlan, by granting a partial stay, permitted transfer of approximately 900,000 of the new preferred shares which had been physically delivered before the original restraining order was issued. Neither the New York Stock Exchange nor the National Association of Securities Dealers has been willing to permit trading of such shares in view of the continued freezing of the remaining 400,000 undistributed shares.

The very situation which confronts this Court in this case demonstrates the importance of so interpreting administrative law as to make it possible for the public safely to rely upon administrative rulings.* It is scarcely in keep-

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*Compare *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 149 (9th Cir. 1952), wherein the Court refused to uphold a board's changed policy, saying:

> "We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors."

ing with the over-all intent in setting up the various administrative tribunals to permit a chaotic situation such as has here arisen because perchance one governmental agency rather than another should have passed upon the issuance of the stock.

It is not as though the preferred stockholders relied on some subordinate agency of the government. The Interstate Commerce Commission is the senior of the two commissions, and Congress by exempting from the Investment Company Act corporations subject to the Interstate Commerce Act has thereby shown its confidence in the ICC (see section 3(c)(9) of the Investment Company Act).

In this instance, the common stockholder appellees instituted this action challenging Alleghany's status vis-a-vis the Investment Company Act shortly after the issuance of the orders. Even so, the consequences have been disastrous to innocent preferred stockholders. How much more chaos would be created if, months or years after the issuance of the status orders, a minority stockholder were to obtain a decree annulling them. Would the District Court then have the right retroactively to void all administrative orders issued in the interim?

According to the opinion below, the 1945 jurisdictional order of the ICC "lost its efficacy" just as soon as the facts which gave rise to it changed (R. 656, 657). It likewise held that the order of the SEC exempting Alleghany from coverage under the Investment Company Act "became automatically inefficacious, with the result that Alleghany immediately became again subject to the Investment Company Act" (R. 657, 658). The mere statement of this holding suggests its dangers: if a change of circumstances automatically removes a corporation from the jurisdiction of one agency and places it in another, who is to pass upon the sufficiency of such changed circumstances and the exact time when the resultant shift should take place?

Again, what happens if the question of ICC jurisdiction is not raised until long after the change takes place?

The answer is that where a corporation is under the regulation of a governmental agency, such regulation should continue until some authoritative determination is made and a time fixed for the change-over.

As a matter of fact, as we shall now show, the ICC and the SEC 1945 orders and the ICC 1955 status order provided for the continuance of their effectiveness until further action by the respective Commissions, and Section 15(2) of the Interstate Commerce Act itself provides for continuance of "all orders" of the ICC until its further order or until revoked by a court of competent jurisdiction.

B. ICC's 1945 and 1955 orders gave it continued jurisdiction over Alleghany.

By order dated June 5, 1945, the ICC held Alleghany, because of its control of Chesapeake & Ohio and other roads, to be subject to the provisions of the Interstate Commerce Act (R. 183-185). No one questions the validity of that order, which provided that it was to remain in effect "unless and until otherwise ordered by this Commission" (R. 185).

By reason of such ICC order, the SEC entered its order on October 4, 1945, placing Alleghany outside of coverage of the Investment Company Act, pursuant to Section 3(c) (9) of that Act (R. 185-186). The SEC order similarly provided that "this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing" (R. 186).

At the time of the issuance of the stock orders herein, the order of the SEC had not been revoked; nor had the status order of June 5, 1945 been revoked except to the extent that in the order providing for its continued jurisdic-

tion over Alleghany, the ICC changed the basis for its jurisdiction—control of New York Central in place of C & O and other carriers.

The District Court in its second opinion declares that "if we are wrong" in holding that the 1945 order became ineffective by reason of changed circumstances "there remains the fact that the ICC, in its [March 2, 1955] 'status' order * * * terminated the June 5, 1945 order * * *" (R. 657). The March 2, 1955 order in its third decretal paragraph does terminate the "Chesapeake & Ohio Railway Company Purchase" order of June 5, 1945 (R. 447). However, the second decretal paragraph of the same 1955 order directs that Alleghany "shall be considered as a carrier" subject to stated provisions of the Interstate Commerce Act "unless and until otherwise ordered by this Commission" and the fourth decretal paragraph provides that "the jurisdiction of this Commission be, and it is hereby retained * * *" (R. 447).

Thus, the ICC by its 1955 order did not intend to terminate, or provide a gap in, its jurisdiction over Alleghany. The Commission, therefore, had jurisdiction at the time it entered its May 26 and June 22, 1955 orders authorizing the issuance of the preferred stock herein by virtue of either the 1945 or the 1955 status orders, both of which retained jurisdiction until further order of the Commission.

Continuance of jurisdiction provided by statute

The Interstate Commerce Act itself provides in Section 15(2):

> "(2) *Orders of commission.* Except as otherwise provided *in this chapter, all orders of the commission,* other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force

> until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction." (Emphasis supplied)

The Court below held Section 15(2) inapplicable on the theory that it "relates solely to rate orders or the like," citing the section title and a footnote in *United States* v. *American Railway Express Co.* (265 U. S. 425, 430, n. 3 (1924), which footnote was considered to have overruled *The Chicago Junction Case*, 264 U. S. 258, 270 (1924) (R. 655).

To demonstrate the incorrectness of the District Court's ruling respecting Section 15(2), we need only examine the language of the paragraph itself. It refers in so many words to "*all* orders of the commission" (emphasis supplied). The use of the expression, "Except as otherwise provided in this chapter"—referring to the chapter entitled "Interstate Commerce Act, Part I, General Provisions and Railroad and Pipe Line Carriers"—likewise demonstrates that Section 15(2) deals with "all orders of the commission" other than those expressly excepted by Section 15(2) itself or by other provisions of the Act.

As for the cases cited by the Court below, it should be noted that *The Chicago Junction Case* expressly applied Section 15(2) to a non-rate order—an order authorizing the purchase of stock and the leasing of property under sections 1(18) and 5(2) of the Interstate Commerce Act.

Justice Brandeis' footnote in the *American Railway Express* case, stating:

> "3. * * * Paragraph 2, of § 15, deals only with the time when the orders under par. 1 take effect"

is not to be interpreted as a reversal of his holding in *The Chicago Junction Case*.

To understand the footnote, it is necessary to consider the issue before the Court in the *American Railway Express* case. The Court was not there concerned with the duration of *any* order of the Commission. The issue was whether the American Railway Express Company was a "carrier by railroad," thus making it subject to Section 15(4).

With characteristic thoroughness, Justice Brandeis, in his footnote 3, analyzed the history of the section and summarized the provisions of the various paragraphs of Section 15 in order that the purpose of paragraph 4 might be better understood. In doing this, he pointed out that paragraph 1 of Section 15 confers regulatory powers on common carriers etc., that paragraph 2 "deals only with the time when the orders under par. 1 take effect," and that paragraph 3 contains no limitation on the Commission's "power to establish through routes to 'carriers by railroad.'" Finally he pointed out that paragraph 4 imposes the limitation as applied to "carriers by railroad," and the holding of the case is that the express company involved was not a "carrier by railroad."

Thus Mr. Justice Brandeis was not reversing his holding in *The Chicago Junction Case*—decided the same year—respecting the scope of paragraph 2, when he stated that it dealt with the orders under paragraph 1. It is clear from the context that he was not excluding from Section 15(2) all orders of the Commission other than rate orders when he was discussing the application of the various paragraphs of Section 15 to that particular case.

Footnote 7 of the District Court's opinion states, in referring to Section 15(2), that "[t]his subsection of the Act is set forth under the heading: 'Determination of Rates, Routes, etc.; Routing of Traffic; Disclosures (of routing), etc.'" (R. 655). Actually, subsection 15(2) has the title "Orders of commission," the court below having confused the headnote for the entire Section 15 with that of the subsection.

Be that as it may, section or subsection headings are not determinative. As stated in *Cornell* v. *Coyne*, 192 U. S. 418, 430 (1904):

> "'The title is no part of an act, and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. [citing cases] The ambiguity must be in the context, and not in the title, to render the latter of any avail.' *United States* v. *Oregon & C. R. Co.*, 164 U. S. 526, 541 * * *."

Again, in *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348, 354 (1920):

> "* * * But the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt."

Section 15(2) is neither ambiguous in its language nor doubtful in its meaning. It applies to "all orders of the commission" save those specifically excepted by other provisions of the "chapter"—the Interstate Commerce Act, Part I. (Compare the analogous provisions in Parts II, III and IV of the Interstate Commerce Act, 49 U. S. C. Sections 321(b), 915(d) and 1016(c)—governing "all orders" respecting regulation of motor carriers, water carriers and freight forwarders—which, in so far as material, employ the same language as is found in Section 15(2)).

Thus, even absent the provisions for continuance of the ICC's orders by their own terms, pursuant to Section 15(2) such orders would still "continue in force until its [the Commission's] further order" or until "suspended or set aside by a court of competent jurisdiction."

Therefore, the orders approving the exchange offer herein, having been issued prior to the entry of the judgment appealed from, were made while ICC jurisdiction was still in force. They should not have been annulled.

POINT II

THE DISTRICT COURT ERRED IN GRANTING AN INJUNCTION AGAINST THE DELIVERY AND TRANSFER OF THE NEW PREFERRED STOCK, THUS CAUSING GREAT HARDSHIP TO THE PREFERRED STOCKHOLDERS. THE COMMON STOCKHOLDERS SHOWED NO LEGAL INJURY OR IRREPARABLE DAMAGE TO JUSTIFY SUCH EXTRAORDINARY AND SWEEPING RELIEF.

The Court below annulled the orders of the ICC and enjoined the completion of the exchange offer, basically upon the ground that the appellees were deprived of the protection of the SEC through the alleged unlawful usurpation of regulation by the ICC (R. 657, 660).

The District Court regarded proof of hardship upon the preferred stockholders as irrelevant (R. 149-150, 151-154). Such hardship was disposed of by the simple statement in the final opinion that the preferred stockholders were entitled to no consideration or relief because they were relying "upon void orders'" (R. 662).

In thus disposing of the plea of these appellants for relief from the hardship which a permanent injunction was bound to inflict upon them, the Court below, we believe, committed error.

The three-judge Court which granted the injunction herein was sitting as a court of equity. Equitable considerations should have governed its determination with respect to the application for an injunction against the Commission's order approving the distribution of the new preferred stock. *Alabama* v. *United States*, 279 U. S. 229, 230 (1929); *Inland Steel Co.* v. *United States*, 306 U. S. 153, 156 (1939); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132, 136 (1939).

As stated in a dissenting opinion by Mr. Justice Stone, concurred in by Justices Holmes and Brandeis, in *United States* v. *Chicago, etc. R. Co.*, 282 U. S. 311, 342 (1931):

> "* * * Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission."

Equitable considerations required the Court below to refuse such a sweeping injunction (a) because appellees did not show either legal injury to give them standing to attack the orders of the ICC, or irreparable damage to justify the extraordinary relief sought by them, and (b) because of the absence of any real damage which denial of the injunction would occasion the minority stockholder plaintiffs as against the disastrous consequences to innocent third parties that were bound to flow from the granting of the injunction.

A. Alleged deprivation of SEC supervision constitutes neither legal injury nor irreparable damage.

As we have seen, the District Court held substantially that the plaintiffs had standing to sue in this case by reason of their being deprived of the advantages of supervision by the SEC instead of the ICC (R. 607-613).

It found also that the plaintiffs were not required to show irreparable damage as distinguished from inadequacy of a remedy at law in their effort "to invoke the protection of the Investment Company Act against an unlawful assumption of jurisdiction by the I.C.C. * * *" (R. 612, 613).

The final opinion added little on this subject, although it did advert to the fact that eventual conversion of the new

preferred stock into common would result in a dilution of the common stockholders' interest in the corporation.*

Appellees have suffered no legal injury

No case has come to our attention where minority stockholders have been permitted to attack orders of either the SEC or the ICC upon the ground that one rather than the other should regulate the corporation involved.

It is well settled that in order for a stockholder to bring a proceeding before a three-judge court to review administrative orders, it is necessary for him to show legal injury to himself. It is not sufficient that he show legal injury to the corporation as a whole or an injury common to all of its investors.

Pittsburgh & West Virginia Railway v. *United States,* 281 U. S. 479 (1930);
New York Central Securities Corp. v. *United States,* 54 F. 2d 122 (S. D. N. Y. 1931), aff'd 287 U. S. 12 (1932);
Miller v. *United States,* 277 Fed. 95 (S. D. N. Y. 1921);
Edward Hines Trustees v. *United States,* 263 U. S. 143 (1923);
Benton v. *United States,* 114 F. Supp. 37 (M. D. Ga. 1953).

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*The Court below did not find that such dilution was either unfair or improper in light of the benefits which the plan afforded common stockholders in the removal of $18,000,000 of preferred dividend arrearages and the placing of the common stock in a position to receive dividends for the first time in 25 years. It is interesting to note that following the announcement of ICC approval of the exchange offer, the common stock rose to 10⅞ (see The Commercial and Financial Chronicle, June 27, 1955, p. 15). Following the recent announcement of the SEC's refusal to exempt the new preferred stock from the provisions of the Investment Company Act, Alleghany's common stock opened on December 3, 1956 at 6¾ and closed at 7 (see The New York Times, December 4, 1956). The exchange offer was based upon a common stock price of 8¾.

Appellees' basic claim of alleged injury is that they, in common with all other stockholders of Alleghany, were denied the benefits of the Investment Company Act. They attack the right of the ICC to grant to Alleghany the status of a carrier, thus permitting the ICC rather than the SEC to pass upon the issuance of the new preferred stock herein.

In essence, therefore, appellees' complaint deals with status and status alone.

But this Court declared in *Shannahan* v. *United States,* 303 U. S. 596, 602 (1938), that

> "the determination of a status or similar matter is not action subject to review under the Urgent Deficiencies Act * * *."

The Court below relied on *Schwabacher* v. *United States,* 334 U. S. 182 (1948) and *New York Central Securities Corp.* v. *United States;* 54 F. 2d 122 (S. D. N. Y. 1931), aff'd 287 U. S. 12 (1932). In *Schwabacher,* there was a voluntary merger in connection with which it was necessary for the ICC to value stockholders' shares. The Commission refused to consider the rights to which the stockholders would have been entitled had there been a liquidation or dissolution instead of a merger. The Commission was ordered to determine such rights without which the complaining stockholders might suffer pecuniary loss.

In *New York Central Securities Corp.,* the (corporate) minority stockholder plaintiff alleged an injury which was found to be

> "not merely derivative through its ownership of stock, but is an independent injury to itself as a member of a class created by the leasing agreements between lessors and lessee" (p. 126).